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California State Senate

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SENATOR, FIFTH DISTRICT



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ON PUBLIC SAFETY, LABOR
AND VETERAN AFFAIRS

September 29, 2006

Ms. Karen Scarborough
Undersecretary for Resources
Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: Proposed Bay-Delta NCCP Planning Agreement

Dear Undersecretary Scarborough:

As Chair of the Delta Resources Subcommittee of the Senate Natural Resources and Water Committee, I am writing to thank you and several other Resources Agency officials (Greg Hurner, Melinda Terry, and Jerry Johns) for the September 26th meeting with my staff, the policy staff of the Senate Natural Resources and Water Committee, and Kim Delfino from Defenders of Wildlife, to discuss the proposed Bay-Delta Natural Community Conservation Plan (NCCP) that has been released for public comment. You are welcome to characterize this letter as a comment on the draft Plan.

I want to reiterate that I believe that Bay-Delta NCCP has potential to remedy several concerns that I have expressed in the past including the apparent lack of incidental take authority under the California Endangered Species Act for Delta smelt (and apparently other species as well) that was the subject of oversight hearings last fall. It is my recollection that the possibility of an NCCP for the Delta was mentioned at those hearings, and I am pleased that the administration is serious about a remedy. Moreover, a NCCP for the Delta could provide a larger framework for resolving other Delta-related issues, and I am willing to work with the administration as this proposed NCCP continues through the planning process.

As you know, I have identified several concerns with the proposed Plan, and very much appreciate the administration's acknowledgement that it intends to resolve those concerns in a manner that is consistent with the existing Natural Community Conservation Planning Act. For the purposes of future documents that are more specific with respect to the development of this Plan, I want to identify those issues for you:

1. The applicants and the duration of the permit should be specified.
2. The administration responded to my concerns about the lack of local government participation by referring to a possible linkage with other local government NCCPs in counties that surround the Delta. It is important that future iterations of the Bay-Delta NCCP clarify the relationships among these NCCPs.
3. The amendments to the NCCP Act by SB 107 (Sher) continued the fundamental approach of state law that state agencies shall seek to conserve endangered species, by which state law defines "conservation" as those steps that will bring endangered species to the point that they no longer need to be listed. The planning agreement is not clear on this point, and this is a very important consideration for many legislators and the conservation community. My suggestion on this point is simply reflective of existing law. Similarly, the draft Plan uses unclear language pertaining to the mitigation and funding obligations of the applicants, and it is of course essential that these important issues are clarified as the Plan moves forward.
4. The Plan does not identify a group of "interested observers." Elsewhere, the conservation members of the Steering Committee, curiously, have agreed to a consensus structure that allows the regulated entities, when a consensus is not reached, to disregard their input. I mention that only in case the parties themselves care to further refine that language.
5. The "outreach" Section, 7.4.2, does not mention the internet which, is a prime tool for public outreach.
6. The review of interim projects was discussed at length at the meeting in my office, and it is important that the level of review and the standards by which interim projects are reviewed is reflected in future iterations of the Plan and is consistent with the NCCP Act.

Resolution of these concerns is of utmost importance to me. I will work with you, the Department of Fish and Game, and the Resources Agency to resolve these concerns, because I strongly believe that a valid, lawful NCCP for the Bay-Delta should be pursued.

Undersecretary Scarborough
September 29, 2006
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I appreciate your consideration of my views, and I look forward to hearing from you. If you have any questions or concerns, please do not hesitate to contact Bethany Westfall, with my office, at 916-651-4005.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael J. Machado', with a stylized, cursive flourish at the end.

MICHAEL J. MACHADO, Chair
Subcommittee on Delta Resources

MJM:bw

Restore the Delta
3303 Dewey Court
Stockton, CA 95212
www.restorethedelta.org

September 30, 2006

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

Sent via fax: (916) 651-7824 and e-mail: scantrel@dfg.ca.gov

RE: Draft Planning Agreement for the proposed Bay Delta Conservation Plan HCP/NCCP

Restore the Delta, a new grassroots organization, represents hundreds of concerned residents from Stockton and the greater Delta Area. Our goal is to make the California Delta, fishable, swimmable, drinkable, and farmable by 2010.

We appreciate this opportunity to comment on the Draft Planning Agreement (Agreement) for the proposed Bay Delta Conservation Plan HCP/NCCP (BDCP).

We commend the Department of Fish and Game for their recognition of the need for serious actions in response to the declining ecological health of the California Bay-Delta Estuary. An HCP/NCCP for the Bay-Delta and its tributaries could improve the long-term viability and sustainability of the region, providing tangible improvements to the environment and to public health.

Unfortunately, the BDCP, if carried out according to the current draft of the Planning Agreement, will not achieve those essential outcomes and will instead exacerbate the current and long-term decline in the health of the estuary.

We therefore urge the Department of Fish and Game and all other potential parties and signatories to reject the Agreement until the following concerns are fully addressed:

1) The Agreement proposes to provide decades of assurances while ignoring the current ecological collapse in the Delta.

Permanent changes in water project operations are necessary today to reverse the continuing ecological collapse and avoid the impending extinction of endangered Delta species. These actions must occur immediately, and cannot be delayed while agencies focus on negotiating decades-long assurances for water project operations under the BDCP. The Agreement should officially recognize the imperiled state of the estuary and explicitly call for implementation of immediate modifications of water project operations and other restoration activities necessary to stabilize and improve the ecological health of the region.

In addition, Delta marine owners, fishing groups, and other Delta business owners, who will suffer substantial economic harm as Delta fisheries continue to collapse, have been left out of participating in the planning of the Agreement. If current water project operational practices continue, hundreds of millions of dollars annually will be lost by the local Delta economy. Where are the assurances for Delta Stakeholders who are economically dependent on the fisheries?

2) The Agreement does not commit to recovery of endangered species.

Currently, the Agreement allows the Potential Regulated Agencies to seek take authorizations under either the Natural Community Conservation Planning Act (NCCPA), which requires actions that provide for the recovery of endangered species, or the California Endangered Species Act (CESA) sections 2080.1 and 2081, which only require mitigation of impacts.

The health of the Bay Delta Estuary has been too severely degraded to sustain the "business as usual" approach embodied in the CESA mitigation standard. In addition, both state and federal regulatory agencies are required by law to provide for the recovery of endangered species. To fulfill those obligations, the agencies must ensure that the entities they regulate undertake actions that lead to species recovery. The agencies must therefore require that the BDCP meet the recovery standards outlined in the Natural Community Conservation Planning Act (NCCPA) before granting any further assurances.

The Agreement must be revised to include a clear commitment on the part of all parties to the preparation of an NCCP to bring endangered species back from the brink of extinction. And without a commitment to bringing back species from the brink of extinction, Delta stakeholders who are economically dependent on fisheries will be greatly harmed.

3) The Agreement encourages increased export of freshwater from the Delta.

The Agreement specifically allows major damaging projects such as the SDIP and the SWP/CVP Intertie, which together could increase water exports out of the Delta by over a million acre feet per year, to proceed, regardless of their impact on the health of the estuary. ("The Parties acknowledge and agree that MOA Projects will not require separate or additional review pursuant to the interim project process set forth in this section." p.17) These projects threaten to shred the ecological fabric of the estuary, pushing endangered species past the point of recovery. The Agreement must require that wildlife agencies review all proposed projects affecting the Delta, including the MOA projects, and reject any that will degrade the environment, prevent species recovery, or compromise successful completion of the BDCP.

Furthermore, as with fishermen and marine owners, Delta farmers have not participated in the drafting of the Agreement. Delta farmers till 500,000 productive acres annually; however, they are not being consulted on how increased water exports will increase salinity, thereby resulting in decreased production yields of irrigated crops throughout the Delta. What will be the economic impact on Delta agriculture as water exports increase and production yields decrease? Again, where are the assurances for Delta stakeholders who are part of the region's vast agricultural economy?

4) The Agreement allows exporters to continue damaging upstream areas.

The Agreement excludes upstream areas from the BDCP Planning Area, allowing the water exporters to receive assurances for additional pumping without being held responsible for the effects of their actions on upstream areas.

To recover endangered species, especially migratory species such as salmon, the Agreement must link actions in the Delta with the rivers that flow into the estuary. Negotiating assurances for water exports in the Delta without addressing the health and sustainability of the upstream watersheds will only ensure species continue to collapse. The Agreement must therefore include upstream areas in the BDCP Planning Area and commit to implementing changes in water project operations and other necessary restoration actions that improve conditions for species recovery both upstream and in the Bay-Delta.

5) The Agreement does not answer the fundamental question, "How much water can be diverted from the Bay Delta Estuary, and under what conditions, while maintaining a healthy ecosystem?"

As the current ecosystem collapse in the Delta demonstrates, the current understanding of the Delta's needs are insufficient for granting the type of long term assurances proposed in the BDCP. Regulatory agencies simply do not know what resources the Estuary needs for recovery or for sustainability. The BDCP must determine first and foremost what conditions are necessary to sustain a healthy ecosystem, including how much water must remain in the Estuary and how much would then be available for diversions and exports. Once this essential information is attained, actions should only be permitted within those known parameters. The Agreement aims to provide long term assurances for water exports without first determining those parameters and must be revised accordingly.

Moreover, it bears repeating that ecosystem health within the Delta is not only essential for the protection of species, but also for the Delta economy. Water quality drives the agriculture and recreation industries within the region, and diverting water, without first protecting the Delta as a natural resource, will, thus, have a negative impact on the Delta economy and the nearly 1,000,000 residents living within the region.

6) The BDCP decision making process is weighted in favor of the water exporters.

The Agreement empowers water exporters to decide how to proceed on any issue where the full steering committee cannot reach agreement. This structure clearly favors exporter priorities above actions necessary to achieve a healthy ecosystem. This allows the process to easily become "hijacked" and severely limits the ability of public agencies and public interest organizations to shape the development of the BDCP.

The Agreement must ensure that the health of the estuary drives decision making. Accordingly, exporters should not be granted ultimate decision making power, and steering committee members who advocate for the environment, in addition to the economic interests of the Delta, as well as the region's cultural and historical heritage, must be allowed equal footing in the decision making process.

7) The BDCP is being rushed to provide assurances at the expense of the environment.

While most conservation plans take five to ten years to develop, the BDCP is scheduled to be completed in only three – with CEQA and NEPA review completed by early 2009. This timeline is inadequate especially considering the size, complexity and fragility of the region. The Agreement must articulate that the BDCP will be prepared according to the needs of the estuary, not the desire for rapid implementation of increased pumping regimes.

Plan	Length of development process	Species covered
Cedar River Watershed HCP	6 years	Total of 83 species, including anadromous fish such as Chinook salmon and steelhead trout
Lower Colorado River Multi-Species Conservation Plan	10+ years	27 species from three different states
Coachella Valley MSHCP-NCCP	10+ years	27 species and their corresponding 27 natural communities
Bay-Delta Conservation Plan	Projected completion in 3 years	Aquatic, riparian and floodplain species including Chinook salmon, steelhead trout, Delta smelt, bank swallow, giant garter snake, etc.

8) The BDCP will bypass other public processes that are investigating how to achieve a sustainable Delta.

The Delta faces severe threats from water project operations, sea level rise, seismicity, subsidence, and urban encroachment. Several efforts including the Delta Risk Management Strategy Study and the Delta Vision Process have been recently initiated to analyze issues of risk and uncertainty in the Delta and develop broadly-supported long-range plans for sustainable management of the Delta's many resources. Although these efforts are intended to shape future actions, the BDCP's timeline is sufficiently abbreviated that it will likely be finalized before these important processes have developed recommended. The Agreement must include a commitment to incorporate emerging science and implement Delta Vision policy recommendations.

It must also outline how operations and permits will be modified in response to changing environmental conditions or unforeseen circumstances, identifying clear decision making mechanisms and processes for adaptive management that will achieve species recovery.

Conclusion

The Bay-Delta Estuary, the largest estuary on the west coast of the Americas, is a natural treasure akin to the Florida Everglades, the Mississippi Delta, and the Chesapeake Bay. It provides habitat to millions of waterfowl and aquatic species, offers recreational opportunities including fishing, boating, and windsurfing, and sustains an historic agricultural tradition. It is

Scott Cantrell, Dept. of Fish and Game, September 30, 2006

an irreplaceable component of our natural heritage and a public trust resource for all Californians.

It is also an imperiled environment experiencing an unprecedented ecological collapse that will have serious economic implications for the region.

To remedy this situation, state and federal wildlife agencies must establish a new level of accountability, demanding immediate and ongoing modifications in water project operations to reduce their impacts on the environment to non-detrimental levels. They must ensure that the public, particularly Delta stakeholders, are adequately informed and allowed to participate fully in all important management decisions. Lastly, they must articulate and implement a viable long-range plan for a sustainable estuary.

This Planning Agreement for the BDCP fails in all those regards and must be rejected. It does not commit to recovery of endangered species and instead allows extremely harmful projects to proceed. It ties the hands of the regulatory agencies while leaving fundamental questions concerning how much water can be sustainably removed from the ecosystem unanswered. It rushes to provide assurances to the detriment of the environment.

For these reasons we respectfully urge you to reject the current Agreement and develop a new document that addresses the above concerns and can lead to recovery of this important resource.

We encourage you to act on our recommendations so as to work toward restoring the Delta for present use, and to preserve it for future generations. We encourage you to make Delta stakeholders equals in the planning process!

Thank you for your consideration,

Barbara Barrigan-Parrilla
Campaign Director
Restore the Delta

Cc:
Karen Scarborough, Resources Agency
Joe Grindstaff, California Bay-Delta Authority
Steve Thompson, U.S. Fish and Wildlife Services
Russ Strach, National Marine Fisheries Service
Senator Mike Machado
Assemblywoman Lois Wolk
Bill Jennings, California Sportfishing Protection Alliance
Matt Vander Sluis, Planning and Conservation League



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Non-Profit Law and Science for Global Resource Solutions

September 29, 2006

Mr. Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento CA 95816

**Re: Comments of the Natural Heritage Institute on the Proposed
Planning Agreement for the Bay Delta Conservation Plan**

Dear Mr. Cantrell:

The Natural Heritage Institute is pleased to tender these comments on the proposed Planning Agreement, which is intended to guide the development of a Bay Delta Conservation Plan (BDCP). The Agreement contemplates that that Plan may constitute, or at least satisfy the requirements of, a Natural Community Conservation Plan, under State law, or a Habitat Conservation Plan, under federal law. As you know, the Natural Heritage Institute is a member of the Steering Committee, charged with developing this Plan. The comments below reflect concerns that NHI has voiced at the Steering Committee meetings.

The premise that seems to animate the Planning Agreement is that the fishery agencies now possess (or can quickly acquire) a sufficient understanding of the ecohydrology of the delta to confidently commit themselves to a static set of conservation measures that will assure the survival and recovery of imperiled species for the foreseeable future, in the face of further expected physical alterations of the delta hydraulics and landforms. The history of efforts to manage and regulate the delta over the past 25 years or so does not seem to warrant this confidence. We have tried to fix the delta over this timeline by addressing the location of the entrapment zone, X-2, delta inflows, inflow/export ratios, habitat restoration measures under CalFed, devices such as the environmental water account, etc. etc., and still the delta species crisis persists while we continue to debate the causes and solutions. As others have noted, the delta is not only more complex than we do understand, it is more complex than we can understand. Never before has an HCP or NCCP been attempted for a system that is so complex and full of surprises.

One would think that with such a history of failed attempts, we would be approaching this BDCP challenge with a precautionary humility. Instead we hear brave talk about how this program is going to marshal the "best science" available to guide the conservation decisions that need to be made, as though the quest for a magic scientific bullet that hasn't been pursued many times before (what was CalFed all about?). Now, great expectations have been created around the "Pelagic Organism Decline" (POD) studies, which are to produce results by the end of 2007. But what is most striking about this study is what it has not yet been able to resolve regarding causes of and mechanisms for the changes in habitat conditions and the decline in the species in this inherently variable, complex and unpredictable system. It seems to us a heroic assumption that these uncertainties will be resolved in time for the BDCP to embody a set of conservation strategies forever fixed and immutable.

We are not suggesting a moratorium on further manipulation of the delta until the uncertainties have been resolved. But at a minimum, we do suggest that the BDCP be predicated upon a realistic appraisal of the risks and adopt a meaningful risk prevention strategy. What would that look like? The mitigation/conservation strategies included in take permits or biological opinions are really just best guesses that need to be treated as regulatory experiments. To avoid imposing the risks of failure on the species, it is essential that the results of conservation measures be monitored and the strategies modified as necessary.

By contrast, the Planning Agreement makes no realistic provision for such adaptive management, commensurate with its commitment to provide regulatory assurances to the Potentially Regulated Entities (PREs). To be sure, the document alludes to the intent to create such an adaptive management program (see paragraphs 6, 7.3 and 7.8). Yet it contains no commitment to a mechanism through which the conservation requirements in take permits (or otherwise) can be increased, should monitoring prove them to be inadequate to protect listed species. Paragraph 4.2 provides that the BDCP, "once approved by USFWS and NMFS" will include the entire universe of measures that can ever be imposed as terms of incidental take permits or biological opinions for covered actions and species, irrespective of whether these measures prove adequate to prevent jeopardy to these species. There is no flexibility for adaptive management contemplated there. Similarly, the regulatory assurance provisions (see e.g., paragraphs 4.5 and 4.6) provide an unqualified guarantee that no additional conservation or mitigation measures will be required of a PRE after the permit is issued--irrespective of how adequate these measures prove to be--unless the costs of such measures are absorbed by the permitting agency. In effect, if DFG, FWS or NMFS believe that the survival of the species requires reductions in delta exports (for instance), those agencies will have to purchase that water from the exporters. But nowhere in the

Planning Agreement is there any acknowledgement of the need for a funding mechanism to enable these agencies to purchase water, or otherwise compensate PREs, should that prove necessary, much less a commitment to create such a mechanism. In sum, while the document pays lip service to adaptive management, it is oblivious to the reality that a funding mechanism will be necessary to operationalize such a program.

Notably, this omission is at variance with the commitment in the "Regulatory Commitments - User Contributions Statement of Principles" (December 19, 2005), which launched the BDCP process, which states as follows:

"The negotiators understand that provisions for **adaptive management**, oversight and coordination, and independent scientific input **will be developed and implemented** as part of the HCP/NCCP process and may result in the need to terminate the HCP/NCCP(s) or provide adequate protection of covered species and proceed under regulatory provisions." (Para. F2).

In other words, if the conservation measures do not prove adequate to protect the covered species, the take permits and their regulatory assurances terminate and the parties revert to the protections otherwise provided under the federal and state endangered species acts.

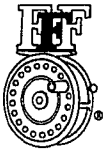
Unless some process is put in place to rectified this oversight, there is a well-founded fear that the eventual BDCP will not be one that the fishery agencies can conscientiously agree to without imposing an unacceptable level of risk on the vulnerable species—in which event an enormous amount of time, effort and expense will have gone into a failed process.

What would a workable mechanism look like? If there were resources committed to the fishery agencies to engage in monitoring and to pay for the additional conservation measures that may be necessary (i.e., to engage in adaptive management), further development of the delta could take place without undue biological risks. As usual, the problem boils down to financial resources. It seems to NHI that there are two options, neither of which are provided for in the Planning Agreement:

- 1) Make the implementation of the BDCP contingent upon the federal and state governments appropriating the funds necessary to make adaptive management work. This would provide a powerful incentive for all stakeholders to move in concert to promote these appropriations (which was expected to happen to finance the CALFED RoD, but did not).

- 2) Set up a "biological risk" insurance arrangement wherein the PREs seeking an incidental take permit or approval of a "reasonable and prudent alternative" under a biological opinion, would pay a "premium" to indemnify them from the costs of implementing additional conservation measures, should the initial requirements prove inadequate. Perhaps this premium should be calibrated to the volume of the PRE's delta exports. The resulting fund would be utilized to compensate PRE's if and when additional measures were required of them by the fishery agencies. In the event that the initial conservation/mitigation requirements prove wholly adequate, the premiums could be refunded.

Such mechanisms are a big step beyond the Planning Agreement in its current form. Rather than propose that the Agreement be reopened at this stage to deal with this critical omission, we suggest instead that the BDCP Steering Committee create a process -- perhaps a working group-- to address this issue with all deliberate haste. Otherwise, the absence of a meaningful adaptive management mechanism may prove to be a fatal flaw.



FEDERATION OF FLY FISHERS™
Conserving • Restoring • Educating Through Fly Fishing
Northern California Council

2 October 2006

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento CA 95816

Sent via email: scantrel@dfg.ca.gov

Draft Planning Agreement for the Proposed Bay Delta Conservation Plan (HCP/NCCP)

We urge the Department of Fish and Game and parties to the Agreement, along with potential participants in the Agreement, not to adopt the Agreement until the following concerns are fully addressed:

The Planning Agreement is not compliant with previous Department of Fish and Game commitments and the NCCP Act

Currently, the Agreement allows the parties to seek take authorizations under either the Natural Community Conservation Planning Act (NCCPA), which requires actions that provide for the recovery, or the California Endangered Species Act (CESA) sections 2080 and 2081, which requires mitigation of impacts. The standard for the Bay Delta Conservation Plan should be the NCCPA, as previously committed to by the California Department of Fish and Game.

Both the State and Federal regulatory agencies are required by law to provide for the recovery of endangered species. To fulfill those obligations, the agencies must ensure that the entities they regulate undertake actions that lead to species recovery. The agencies should therefore require that the Bay Delta Conservation Plan actions meet the recovery standards outlined in the NCCPA before granting any assurances.

The Agreement states that the goal of the Bay Delta Conservation Plan is to "contribute to recovery of endangered species". The NCCPA only allows take permits for species whose "conservation and management is provided for in a Natural Community Conservation Plan (Fish and Game Code Section 2835)" and defines conservation as actions that are necessary to provide for recovery of the species, not simply contribute to recovery (Fish and Game Code Section 2805 (d)). References to "contribution to recovery" should therefore be removed from the Agreement.

We fear that the Agreement has backpedaled from the original commitments because of the (undue) influence of water agencies and water contractors. The justification for the backpedaling has not been disclosed nor has the rationale been provided for compromising the recovery standard. The prosecution of a compromised Agreement, without full vetting of the process that lead to compromise, would be unwise and may be unlawful.

The Planning Agreement excludes important linkages

The Agreement excludes upstream areas from the Planning Area, in contradiction to previous commitments by the Department of Fish and Game. To recover endangered species, especially migratory species such as salmon and steelhead, the Agreement must link actions in the Delta with the rivers that flow into the estuary. Negotiating assurances for water exports in the Delta without addressing the health and sustainability of the upstream watersheds will ultimately undermine recovery. The Agreement must therefore include upstream areas in the Planning Area and commit to implementing changes in water project operations and other necessary restoration actions that improve conditions for species recovery both upstream and in the Bay-Delta.

The Planning Agreement timeline is not realistic

If completed within the proposed timeline, the Bay Delta Conservation Plan will be the fastest plan on record for the State. Given the complexity of Bay Delta ecosystem, the widely recognized Pelagic Organism Decline and the current scientific uncertainty in identifying the causes of the decline, and the contentious issues associated with Delta water operations, the timeframe for the Bay Delta Conservation Plan is unrealistically short. The assurances that result from the Plan are long-lasting and a rush to judgment will be unwise. A credible Planning Agreement must include a credible timeframe.

The Delta faces severe threats from water project operations, sea level rise, seismicity, subsidence, and urban encroachment. Several efforts, including the Delta Risk Management Strategy Study and the Delta Vision Process, have been recently initiated to analyze issues of risk and uncertainty in the Delta and develop broadly-supported long-range plans for sustainable management of the Delta's many resources. Although these efforts are intended to shape future actions, the Agreement timeline is sufficiently abbreviated that it will likely be finalized before these important processes have developed recommended actions. The Agreement must include a commitment to incorporate emerging science and implement Delta Vision policy recommendations.

The Planning Agreement does not include important stakeholders

In-Delta farmers and fishers are absent from the Agreement and the credibility of the process will suffer accordingly. The Agreement should not be finalized until sufficient efforts are made to broaden stakeholder representation.

Concluding Comments

The Bay-Delta Estuary is an imperiled environment experiencing an unprecedented ecological collapse. To remedy this situation, State and Federal wildlife agencies must establish a new

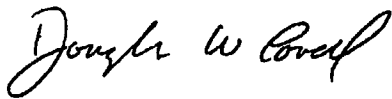
level of accountability, demanding immediate and ongoing modifications in activities that negatively impact the ecosystem, including water project operations. They must ensure that the public is adequately informed and allowed to participate fully in all important management decisions. Lastly, they must devise, articulate, and implement a viable long-range plan for a sustainable estuary, with recovered fisheries.

This Planning Agreement for the Bay Delta Conservation Plan fails in all those regards and must be modified. It does not commit to species recovery and instead will allow extremely harmful projects to proceed. It potentially ties the hands of the agreement parties while leaving fundamental questions concerning how much water can be sustainably removed from the ecosystem unanswered. It rushes to provide assurances to the detriment of the environment.

Thank you for considering these comments.

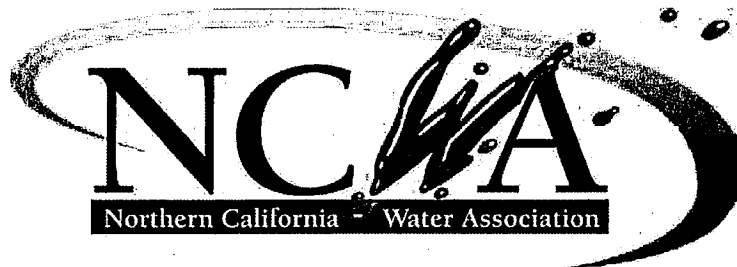
Sincerely,

Northern California Council / Federation of Fly Fishers



Douglas W. Lovell
Chairman, Bay-Delta Committee
510-528-4234 (work)
doug@streamborn.com

Northern California Council / Federation of Fly Fishers
PO Box 8330
Berkeley CA 94707



To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.

October 2, 2006

Via Electronic and U.S. Mail

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95814

Re: Comments on Proposed Planning Agreement for Bay Delta Conservation Plan (BDCP)

Dear Mr. Cantrell:

Thank you for the opportunity to comment on the proposed Planning Agreement (PA) for the BDCP. The Northern California Water Association (NCWA) and its counsel have reviewed the proposed PA and provide the following comments for your consideration.

Planning Area/Geographic Scope

NCWA appreciates the Steering Committee's effort to refine the geographic scope of the BDCP. However, NCWA continues to have serious concerns about the overly broad and ambiguous parameters established in the draft PA. We do not support any effort to apply the so-called "California Bay-Delta Conservation Plan" to areas outside of the Bay-Delta as defined statutorily in section 12220 of the California Water Code (Statutory Delta).

The Planning Agreement must “define the geographic scope of the conservation planning area.” (Cal. Fish & Game Code, § 2810 (b)(2); HCP Handbook, p. 3-11 [“HCP boundaries should be exact as possible to avoid later uncertainty.”].) Thus, the Steering Committee must adhere to its agreement that “the Planning Area for the BDCP will consist of the Statutory Delta.” (See e.g., PA, p. 11, ¶ 5.) However, the PA suggests that the ultimate BDCP may include areas other than the Statutory Delta. (See e.g., PA, p. 7 at ¶ 2 [“*initial* geographic scope of the Planning Area”]; p. 8 at ¶ 3 [“Planning Area may be modified”].)

NCWA urges the Steering Committee to focus on the Statutory Delta and the problems *in* the Delta and avoid the “inherent risks of an over-extended, protracted HCP effort.” (HCP Handbook, p. 3-11.) An over-inclusive geographic scope that reaches the BDCP into the upstream tributaries will create unproductive and unnecessary overlap with local efforts to restore and manage instream habitat. To the extent the success of the BDCP depends on certain conservation actions outside of the statutory Delta, arrangements should be made through cooperative, voluntary, and *separate* agreements with local water users, water purveyors, and governmental agencies. (See HCP Handbook, p. 3-11 [“HCP boundaries should encompass all areas within the applicant’s project, land use area, or jurisdiction. . . .”], p. 3-12 [“Private, state, or locally-owned lands should *never be considered* for inclusion in HCPs as reserves without the concurrence of the landowners or their representatives”], p. 3-13 [“No group can be forced to participate”].)

Conservation Areas and Viable Habitat Linkages

The PA suggests that the BDCP will “identify where linkages between important habitat areas inside and outside the Planning Area should occur.” (PA, p. 12, ¶ 6.1.2.) This language is ambiguous and provides the public no certainty about what is intended by the use of these so-called “habitat linkages.” The PA should clarify the intent and purpose of identifying habitat linkages outside the Planning Area. (See HCP Handbook, p. 3-4 [“HCP participants should avoid creating an impression that they are pursuing unstated agendas”].) NCWA requests that the PA explain how it plans to identify habitat linkages and conservation projects outside the Planning Area, how these projects will be implemented, and what the long-term effects will be on local landowners, water users, and governmental agencies in those areas.

Covered Species

The PA suggests¹ that the BDCP may cover terrestrial species. (PA, p. 12, ¶ 6.1.1 [“Other species that will be considered for inclusion in the BDCP include Swainson’s hawk, bank swallow, giant garter snake and valley elderberry longhorn beetle”].) This attempt to step out of the Statutory Delta waters and into upland habitat for terrestrial species threatens to overextend the significant resources invested in the BDCP. (HCP

¹ The decision of which species to include cannot be pushed off indefinitely. (See HCP Handbook, p. 3-7 [“one of the first decisions an HCP applicant must make is what species to address in the plan”], 3-8 [“the species list should be developed and agreed upon early in the HCP process”].)

Handbook, p. 3-11 ["Attempts to satisfy too many land use or endangered species issues in one effort can be frustrated by excessive complexity, shortages of biological information, and difficulties in securing consensus of HCP participants"].) The PA makes the BDCP vulnerable to collapse under the weight of too many species. The BDCP should focus on the problems in the Statutory Delta and avoid any temptation to expand this effort to terrestrial species.

Inclusion of terrestrial species, particularly those found outside of the Statutory Delta, will also risk unnecessary and unproductive overlap with locally developed programs for terrestrial species. Such overlap would interfere with local land use authority. Notably, the "local agenc[ies] that ha[ve] land use permit authority over" the lands upon which the identified terrestrial species depend have not committed to participate in the BDCP. (Cal. Fish & Game Code, § 2810 (a); see also HCP Handbook, p. 3-2 ["The permittee must ... have the authority to regulate the activities covered by the permit"], p. 3-3 ["acceptable so long as the permittees have the authority to regulate or control all or applicable parts of the HCP program"].) To the extent the success of the BDCP depends on land use restrictions and management of terrestrial habitat, these arrangements should be made through cooperative, voluntary, and *separate* agreements or memorandums of understanding with local government and landowners.

Covered Activities

The PA does not give the public any idea of what activities will actually be covered by the BDCP. (PA, p. 8 at ¶ 3 ["Covered Activities . . . may be modified"]; p. 16, ¶ 7.5 ["Covered Activities may include, but are not necessarily limited to, existing or new activities related to . . ."].) The PA should unambiguously state what specific activities the BDCP will cover.

Interim Projects/Fish Agency Review

The PA states that the "Fishery Agencies will recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives and will not preclude important conservation planning options or connectivity between areas of high habitat values." (PA, p. 18, ¶ 7.6.2.) This provision is ambiguous and must be clarified. (See HCP Handbook, p. 3-4 ["HCP participants should avoid creating an impression that they are pursuing unstated agendas"].)

Amendments

The PA suggests that the Parties can amend the PA without any additional public input. This provision must be revised to provide a 21-day public review and comment period pursuant to the NCCPA. (Cal. Fish & Game Code, § 2810(d).)

We generally support the efforts to develop a mechanism that will protect the Bay-Delta ecosystem while providing assurances for water deliveries. The problems in

the Statutory Delta, however, should not and will not be solved by directing BDCP activities to areas outside of the Statutory Delta. We urge you to focus your collective efforts on resolving the environmental problems in the Statutory Delta through mitigation and enhancement activities within the Statutory Delta. Proceeding in this manner will, among other things, ensure that actions to solve problems within the Bay-Delta do not interfere with the numerous fish and wildlife conservation efforts underway outside the Statutory Delta.

Thank you for consideration of these comments.

Sincerely,



David J. Guy
Executive Director

cc: Michael Chrisman
Karen Scarborough
Ryan Broddrick
Lester Snow
Kirk Rodgers
Steve Thompson
Rodney McInnis
NCWA Bay-Delta Committee



BAYKEEPER.

*Defending Our Waters—from the
High Sierra to the Golden Gate*

October 2, 2006

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

Sent via e-mail to scantrel@dfg.ca.gov

**RE: Draft Planning Agreement for the proposed Bay Delta Conservation Plan
HCP/NCCP**

Dear Mr. Cantrell:

On behalf of Baykeeper, including our San Francisco Bay and Deltakeeper chapters, we thank you for the opportunity to comment on the Draft Agreement (Agreement) for the proposed Bay Delta Conservation Plan HCP/NCCP (BDCP).

We commend the Department of Fish and Game for their recognition of the need for serious actions in response to the declining ecological health of the California Bay-Delta Estuary. An HCP/NCCP for the Bay-Delta and its tributaries could improve the long-term viability and sustainability of the region, providing tangible improvements to the environment and to public health.

Unfortunately, the BDCP, if carried out according to the current draft of the Planning Agreement, will not achieve those essential outcomes and will instead exacerbate the current and long-term decline in the health of the estuary.

Therefore, we urge the Department of Fish and Game and all other potential parties and signatories to reject the Agreement until the following concerns are fully addressed:

1) The Agreement proposes to provide decades of assurances while ignoring the current ecological collapse in the Delta.

Permanent changes in water project operations are necessary today to reverse the continuing ecological collapse and avoid the impending extinction of endangered Delta species. These actions must occur immediately, and cannot be delayed while agencies focus on negotiating decades-long assurances for water project operations under the



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○ Deltakeeper, Chapter of Baykeeper
445 West Weber Avenue, Suite 137B
Stockton, CA 95203
Tel (209) 464-5090
Fax (209) 464-5174

BDCP. The Agreement should officially recognize the imperiled state of the estuary and explicitly call for implementation of immediate modifications of water project operations and other restoration activities necessary to stabilize and improve the ecological health of the region.

2) The Agreement does not commit to recovery of endangered species.

Currently, the Agreement allows the Potential Regulated Agencies to seek take authorizations under either the Natural Community Conservation Planning Act (NCCPA), which requires actions that provide for the recovery of endangered species, or the California Endangered Species Act (CESA) sections 2080.1 and 2081, which only require mitigation of impacts.

The health of the Bay Delta Estuary has been too severely degraded to sustain the "business as usual" approach embodied in the CESA mitigation standard. In addition, both state and federal regulatory agencies are required by law to provide for the recovery of endangered species. To fulfill those obligations, the agencies must ensure that the entities they regulate undertake actions that lead to species recovery. The agencies must therefore require that the BDCP meet the recovery standards outlined in the Natural Community Conservation Planning Act (NCCPA) before granting any further assurances.

The Agreement must be revised to include a clear commitment on the part of all parties to the preparation of an NCCP to bring endangered species back from the brink of extinction.

3) The Agreement encourages increased export of freshwater from the Delta.

The Agreement specifically allows major damaging projects such as the SDIP and the SWP/CVP Intertie, which together could increase water exports out of the Delta by over a million acre feet per year, to proceed, regardless of their impact on the health of the estuary. ("The Parties acknowledge and agree that MOA Projects will not require separate or additional review pursuant to the interim project process set forth in this section." p.17) These projects threaten to shred the ecological fabric of the estuary, pushing endangered species past the point of recovery. The Agreement must require that wildlife agencies review all proposed projects affecting the Delta, including the MOA projects, and reject any that will degrade the environment, prevent species recovery, or compromise successful completion of the BDCP.

4) The Agreement allows exporters to continue damaging upstream areas.

The Agreement excludes upstream areas from the BDCP Planning Area, allowing the water exporters to receive assurances for additional pumping without being held responsible for the effects of their actions on upstream areas.

To recover endangered species, especially migratory species such as salmon, the Agreement must link actions in the Delta with the rivers that flow into the estuary. Negotiating assurances for water exports in the Delta without addressing the health and sustainability of the upstream watersheds will only ensure species continue to collapse. The Agreement must therefore include upstream areas in the BDCP Planning Area and commit to implementing changes in water project operations and other necessary restoration actions that improve conditions for species recovery both upstream and in the Bay-Delta.

5) The Agreement does not answer the fundamental question, "How much water can be diverted from the Bay Delta Estuary, and under what conditions, while maintaining a healthy ecosystem?"

As the current ecosystem collapse in the Delta demonstrates, the current understanding of the Delta's needs are insufficient for granting the type of long term assurances proposed in the BDCP. Regulatory agencies simply do not know what resources the Estuary needs for recovery or for sustainability. The BDCP must determine first and foremost what conditions are necessary to sustain a healthy ecosystem, including how much water must remain in the Estuary and how much would then be available for diversions and exports. Once this essential information is attained, actions should only be permitted within those known parameters. The Agreement aims to provide long term assurances for water exports without first determining those parameters and must be revised accordingly.

6) The BDCP decision making process is weighted in favor of the water exporters.

The Agreement empowers water exporters to decide how to proceed on any issue where the full steering committee cannot reach agreement. This structure clearly favors exporter priorities above actions necessary to achieve a healthy ecosystem. This allows the process to easily become "hijacked" and severely limits the ability of public agencies and public interest organizations to shape the development of the BDCP.

The Agreement must ensure that the health of estuary drives decision making. Accordingly, exporters should not be granted ultimate decision making power and steering committee members who advocate for the environment must be allowed equal footing in the decision making process.

7) The BDCP is being rushed to provide assurances at the expense of the environment.

While most conservation plans take five to ten years to develop, the BDCP is scheduled to be completed in only three – with CEQA and NEPA review completed by early 2009. This timeline is inadequate especially considering the size, complexity and fragility of the region. The Agreement must articulate that the BDCP will be prepared according to the

needs of the estuary, not the desire for rapid implementation of increased pumping regimes.

Plan	Length of development process	Species covered
Cedar River Watershed HCP	6 years	Total of 83 species, including anadromous fish such as Chinook salmon and steelhead trout
Lower Colorado River Multi-Species Conservation Plan	10+ years	27 species from three different states
Coachella Valley MSHCP-NCCP	10+ years	27 species and their corresponding 27 natural communities
Bay-Delta Conservation Plan	Projected completion in 3 years	Aquatic, riparian and floodplain species including Chinook salmon, steelhead trout, Delta smelt, bank swallow, giant garter snake, etc.

8) The BDCP will bypass other public processes that are investigating how to achieve a sustainable Delta.

The Delta faces severe threats from water project operations, sea level rise, seismicity, subsidence, and urban encroachment. Several efforts including the Delta Risk Management Strategy Study and the Delta Vision Process have been recently initiated to analyze issues of risk and uncertainty in the Delta and develop broadly-supported long-range plans for sustainable management of the Delta's many resources. Although these efforts are intended to shape future actions, the BDCP's timeline is sufficiently abbreviated that it will likely be finalized before these important processes have developed recommended. The Agreement must include a commitment to incorporate emerging science and implement Delta Vision policy recommendations.

It must also outline how operations and permits will be modified in response to changing environmental conditions or unforeseen circumstances, identifying clear decision making mechanisms and processes for adaptive management that will achieve species recovery.

Conclusion

The Bay-Delta Estuary, the largest estuary on the west coast of the Americas, is a natural treasure akin to the Florida Everglades, the Mississippi Delta, and the Chesapeake Bay. It provides habitat to millions of waterfowl and aquatic species, offers recreational opportunities including fishing, boating, and windsurfing, and sustains an historic agricultural tradition. It is an irreplaceable component of our natural heritage and a public trust resource for all Californians.

It is also an imperiled environment experiencing an unprecedented ecological collapse.

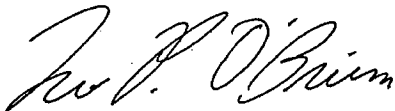
To remedy this situation, state and federal wildlife agencies must establish a new level of accountability, demanding immediate and ongoing modifications in water project operations to reduce their impacts on the environment to non-detrimental levels. They must ensure that the public is adequately informed and allowed to participate fully in all important management decisions. Lastly, they must articulate and implement a viable long-range plan for a sustainable estuary.

This Planning Agreement for the BDCP fails in all those regards and must be rejected. It does not commit to recovery of endangered species and instead allows extremely harmful projects to proceed. It ties the hands of the regulatory agencies while leaving fundamental questions concerning how much water can be sustainably removed from the ecosystem unanswered. It rushes to provide assurances to the detriment of the environment.

For these reasons we respectfully urge you to reject the current Agreement and develop a new document that addresses the above concerns and can lead to recovery of this important resource.

Please notify us of how you plan to proceed on these issues and provide a rationale for your decision.

Thank you,



Leo P. O'Brien
Executive Director

Cc:

Karen Scarborough, Resources Agency
Joe Grindstaff, California Bay-Delta Authority
Steve Thompson, U.S. Fish and Wildlife Services
Russ Strach, National Marine Fisheries Service
Senator Mike Machado
Assemblywoman Lois Wolk
Bill Jennings, California Sportfishing Protection Alliance
Matt Vander Sluis, Planning and Conservation League

Placer County Water Agency

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October 2, 2006
File 100-12, CALFED

Scott Cantrell, Staff Environmental Specialist
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95814

Ralph Svetich, DRM Project Manager
California Department of Water Resources
901 P Street,
Sacramento, CA 95814-3515

Re: Comments for Draft Bay-Delta Conservation Planning Agreement

Dear Sirs:

Placer County Water Agency (Agency) has read with interest the draft dated (September 8, 2006) of the Bay-Delta Conservation Planning Agreement (Agreement), and provides the following comments and recommended changes to the Agreement.

As you may be aware, the Agency has long supported the efforts of the state and federal governments to manage and restore the Sacramento-San Joaquin River Delta (Delta), under the principles enunciated in the CALFED process. The cornerstone of that process was that the costs of Delta restoration and improvement of water supply and reliability be underwritten by the direct beneficiaries of actions taken. The draft Bay-Delta Conservation Planning (BDCP) Agreement departs from the "beneficiary-pays" principle. The Agency herein files objections to this and recommends the Agreement be changed to restore the "beneficiary-pays" principle.

The Agency owns and operates the Middle Fork American River Project (MFP) located in the Sierra, along the Rubicon and Middle Fork American Rivers above Folsom Reservoir. The US Bureau of Reclamation controls all flows downstream of Folsom Reservoir. The MFP was constructed by the Agency and consists of two major storage reservoirs with a joint capacity of 343,000 acre feet and water rights of 120,000 acre feet. Water is diverted to storage primarily during the spring snowmelt when Folsom Reservoir downstream is also filling to capacity and, at times, is operating under flood control regulations. Further, the MFP captures water that otherwise would flow unregulated down the American River, the Sacramento River, through the Delta to the Bay and out the Golden Gate at the time of year when flows are generally abundant.

Scott Cantrell and Ralph Svetich

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The MFP water provides needed municipal and irrigation water to the residents and lands of Placer County and is a non-polluting hydropower generation resource. The Agency is attentive to and opposes any activities or actions that compromise the water supply, reliability, power generation, and financial security achieved by our MFP.

The Agency also purchases 125,400 acre-feet of water from the Pacific Gas and Electric (PG&E) Company from their Drum-Spaulling system of the Yuba-Bear Rivers. This water is also utilized by the Agency for needed municipal and irrigation purposes by the residents and lands in Placer County. The Agency also opposes any activity or actions that compromise the water supply and reliability to the Agency from our PG&E water contract.

The draft Agreement contains references proposing to take actions beyond the Delta in what the Agreement terms "areas upstream of the Delta." For example, paragraph 5 on page 11 of the Agreement notes that

[I]t may be necessary for the BDCP to include conservation actions outside of the Statutory Delta that advance the goals and objectives of the BDCP, including, as appropriate, conservation actions in the Suisun Marsh, Suisun Bay, and areas upstream of the Delta.

Further, the Memorandum of Agreement attached as Exhibit B to the draft Agreement also states that

This Memorandum of Agreement (MOA) is intended to further:

1. The development of a conservation plan for the Delta and its upstream basins, hereinafter referred to as the Bay Delta Conservation Plan

The Agency could support the proposed BDCP Agreement if it is consistent with the CALFED cornerstone principle that only those that benefit directly from actions, projects and activities are responsible for the costs thereof and that there are no redirected impacts by actions of the Agreement that undercut the reliability of water rights or water users upstream of the Delta.

The Agency therefore recommends that the Agreement be revised to expressly limit the Agreement so that its financial and environmental impacts be solely the obligation of those participants and parties specifically signatory to the Agreement.

The Agency also recommends that *before* any of the signatories to the Agreement embark on consideration of any activities or actions that could affect the water supplies and reliability of any upstream water right holders and water users, that the parties to the

Scott Cantrell and Ralph Svetich

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October 2, 2006

Agreement inform in writing all upstream stakeholders that such activities may be considered and that all upstream stakeholders be invited to attend any and all meetings at which such proposed activities and actions may be considered. More specifically, the Agency recommends that the signatories to the Agreement take no action unless and until all stakeholders in "areas upstream of the Delta" agree. Further, if no agreement is achieved with upstream stakeholders, then the signatories shall take no action which in any way places any cost or any change in water supply or reliability upon the stakeholders in "areas upstream of the Delta."

Thank you for your consideration of these comments.

Sincerely,

PLACER COUNTY WATER AGENCY


David A. Breninger
General Manager

AF/DB/cs

c: Senator Barbara Boxer
Senator Dianne Feinstein
Congressman John Doolittle
Governor Arnold Schwarzenegger
Senator Sam Aarstad
Senator Dave Cox
Assemblyman Tim Leslie
Placer County Board of Supervisors and County Executive Officer
City/Town Councils: Six incorporated Cities in Placer County and City/Town Managers
Pacific Gas & Electric Company: Kevin Goishi, Partnership Coordinator, and Randy Livingston,
Manager of Asset Management
US Bureau of Reclamation, Mid-Pacific Regional Director
Nevada Irrigation District: Board of Directors and General Manager
San Juan Water District: Board of Directors and General Manager
South Sutter Water District: Board and General Manager
Association of California Water Agencies: Board and Executive Director
California Municipal Utilities Association: Board and Executive Director
Mountain Counties Water Resources Association: Board and Executive Director
Northern California Power Agency: Board and General Manager
Northern California Water Association: Board and Executive Director
Pacific Forest and Watershed Lands Stewardship Council
Regional Council of Rural Counties: Board and Executive Director
Regional Water Authority: Board and Executive Director
Sacramento Water Forum: Executive Director
Sierra Business Council: Board and President
Sierra Nevada Conservancy: Board and Executive Director
Water Education Foundation: Board and Executive Director
Placer County Water Agency Board



National Wildlife Federation

Western Natural Resource Center
6 Nickerson Street, Suite 200 ♦ Seattle, Washington, 98109
(206) 285-8707 ♦ Fax: (206) 285-8698 ♦ www.nwf.org

October 2, 2006

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

RE: Bay Delta Conservation Plan HCP/NCCP Draft Planning Agreement

The National Wildlife Federation, on behalf of our four million members and supporters, submits the following comments on the Draft Planning Agreement for the proposed Bay Delta Conservation Plan HCP/NCCP (BDCP).

Although we recognize the potential environmental benefits from the development of an HCP/NCCP for the California Bay Delta Estuary, we share the grave concerns detailed by other environmental, conservation, and fishing organizations about the current Planning Agreement for the BDCP. For example, in spite of the declining health of the estuary, the Planning Agreement does not commit to provide for the recovery of endangered species and exempts destructive new increases in water exports from review as required under California's Natural Communities Conservation Planning Act.

In addition, we are particularly concerned that the Planning Agreement does not adequately address the potential effects of Global Climate Change on the Bay Delta and on statewide water management. Numerous scientific studies predict that climate change will have an increasingly negative impact on California's water resources. According to a July 2006 summary report from the California Climate Change Center, Sierra snowpack may be reduced by as much as 70-90% by the end of the century. Other impacts to water resources include more intense flooding events, more severe droughts, and rising sea levels in the Delta.

These predicted changes will likely necessitate a reduced reliance on the Bay Delta as a source of water for agriculture, municipal and industrial uses across the state.

Accordingly, the Planning Agreement must commit to incorporating the latest information on climate change into development of the BDCP. It must also identify a decision making process to respond to changing environmental conditions after implementation of the BDCP, identifying

clear decision making mechanisms and processes for adaptive management that will achieve species recovery.

Thank you for this opportunity to comment on the BDCP Planning Agreement. Please inform us of how you plan to address these outstanding issues.

Sincerely,

A handwritten signature in black ink, reading "Paula J. Del Giudice". The signature is written in a cursive style with a large, stylized "P" and "J".

Paula J. Del Giudice, Director

Western Natural Resource Center
National Wildlife Federation
6 Nickerson Street, Suite 200
Seattle, WA 98109
Phone: 206-285-8707



SIERRA CLUB
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October 2, 2006

Via Hand Delivery

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95814

Re: *Comments on the "Planning Agreement regarding the Bay Delta Conservation Plan," dated September 8, 2006*

Dear Mr. Cantrell:

On the behalf of Defenders of Wildlife and Sierra Club California, we are writing to comment on the draft Planning Agreement regarding the Bay Delta Conservation Plan ("BDCP"), hereinafter the "Planning Agreement." We strongly support the creation of a Natural Community Conservation Plan ("NCCP") for the Bay Delta. If designed correctly, such a plan should provide for the conservation of numerous imperiled and declining fish and wildlife in the Delta. Thus, we applaud the entities involved in this important conservation effort.

However, based on our review of the Planning Agreement, we are deeply concerned about the current agreement. Under the NCCP Act, the planning agreement sets forth the basic framework in which an NCCP is prepared. The NCCP Act requires that planning agreement must:

- establish the geographic scope of the plan,
- identify a preliminary list of species and habitats to be considered,
- identify preliminary conservation strategies,
- establish an independent scientific review process,
- establish an interim process during plan development by which projects can be reviewed for potential conflicts with the conservation goals of the plan, and
- establish a process for public participation.

Fish and Game Code § 2810.

We understand that a planning agreement is not the ultimate plan. However, that does not mean that planning agreements are in and of themselves unimportant. Indeed, planning agreements set forth key parameters of the planning process (e.g., the species to be researched and ultimately permitted for take, the planning area, the basic conservation goals, etc.) and set the tone for the

process. In addition, planning agreements also detail the critical interim project review process, the scientific review process and the public participation process. Finally, since these documents are essentially contracts and thus binding on the signatories, the commitments made in a planning agreement create both the ceiling and the floor of the planning process. Rarely will plan participants exceed the commitments in a planning agreement.

It is in this context that we are reviewing the current draft planning agreement. Moreover, it is in this context that we are concerned that parameters set forth in the Planning Agreement portend that the BDCP ultimately may not meet the strong conservation standards and other statutory requirements of the Natural Community Conservation Planning ("NCCP") Act. *See* Fish and Game Code Sections 2800-2825. In addition, the Planning Agreement also is inconsistent with both the state and federal Endangered Species Acts ("ESA"). Thus, the parties to the draft Planning Agreement must revise this draft agreement in order both to comply with the NCCP Act and to ensure that planning process will achieve the approval standards for NCCPs.

Is the BDCP an NCCP or not?

While it is our hope that the BDCP will be an NCCP, it is clear that the question of whether or not this plan will be an NCCP is still very open to debate between the parties. Throughout the Planning Agreement, there is language indicating that the BDCP could be either an NCCP or 2081 permit. (See, e.g., Section 1.5 of the Planning Agreement (covered activities means those activities covered pursuant to sections 2081 and/or 2825 of the Fish and Game Code).) In fact, the Planning Agreement section that sets forth the Preliminary Conservation Objectives includes "minimization and mitigation" as well as the "no jeopardy" standard, both of which are requirements of the California Endangered Species Act ("CESA"), not the NCCP Act. (See Planning Agreement, p. 11, ¶ 6.

The question of whether the BDCP is an NCCP or a 2081 permit must be resolved prior to execution of the Planning Agreement because it would be an enormous waste of time and public funds to spend three years designing an NCCP only to have the Potentially Regulated Entities decide that they really do not want to meet the NCCP standards after all and instead opt for the lower "no jeopardy" standard of section 2081 of the Fish and Game Code. A planning agreement should commit the parties up front to preparing an NCCP. While it is always a possibility that plan participants will abandon an NCCP during the planning process, it certainly does not bode well for this process that the parties cannot decide whether or not this plan will actually be an NCCP. Moreover, given this lack of clarity as to whether or not the plan will meet a conservation standard or minimal jeopardy standard, we are concerned about the integrity of the scientific review process. Will parties direct the scientists to provide strategies, management principles and adaptive management recommendations to meet a jeopardy standard or a conservation standard? Will the plan merely be a mitigation document or will it provide for the conservation of the covered species?

What is "Conservation?"

Section 3 of the Planning Agreement states that the goal of the BDCP is "provide for the conservation and management of Covered Species." If the paragraph had simply stopped at that

sentence regarding the BDCP goal, the agreement would be consistent with the NCCP Act. However, the Planning Agreement continues by stating that conservation “means that the plan will ensure the implementation of measures that will *contribute to* the recovery of Covered Species” and that the “planning goal is intended to reflect the constraints inherent to the BDCP that *may limit its capacity to ensure the recovery* of Covered Species.” Planning Agreement, p. 8, ¶ 3 (emphasis added); see also p. 11, ¶ 6.

The approval standard for an NCCP, as defined by the NCCP Act, is that the plan must provide for the conservation of the covered species. See Fish and Game Code § 2835. We believe that “contribution to recovery” is not the same standard, and is in fact a lesser standard, than “providing for conservation.” It is possible to contribute incrementally toward the recovery of a species, but not actually provide for that species conservation within the plan area. Moreover, to begin the planning process with the statement that the planning goal (which is supposedly to meet the conservation standard in the NCCP Act) may not ensure recovery due to “constraints inherent in the BDCP,” gives the parties unacceptable discretion to subsequently decide that the BDCP is not an NCCP at all. In order to ensure that the parties will develop a BDCP that will clearly meet the approval standard set forth in Sections 2805(d) and 2835 of the NCCP Act, the parties must amend this agreement to read that the preliminary goals of the NCCP are to “provide for the conservation of Covered Species” and delete the “inherent constraint” language.

Take of Unlisted Species

Section 4 of the Planning Agreement details the conditions under which take is permitted for covered species. For the most part, this section sets forth the statutory requirements accurately. However, this section incorrectly interprets the California Endangered Species Act (“CESA”) when it states, “[n]on-listed species may be included as covered species in a conservation plan prepared pursuant to CESA, but a CESA take authorization would become effective with regard to non-listed species only if and when such species were listed.” Planning Agreement, pp. 8-9, ¶ 4. Unlike the NCCP Act, which does provide for the take of unlisted species after listing occurs during the course of an approved NCCP, CESA makes no mention of the conditions in which an unlisted species may be taken under a 2081 permit. CESA does not allow a 2081 permit to set forth the conditions under which “take” would be authorized for an unlisted species once it is listed. Indeed, since the NCCP Act is so explicit regarding such conditions for take of unlisted species and CESA is silent regarding unlisted species, any attempt to allow take conditions to be put into a 2081 permit is *ultra vires*. Therefore, the parties must strike the language regarding the take of unlisted species in a 2081 permit from the Planning Agreement.

Limitations to the Implementation of the BDCP

Section 4.1 of the Planning Agreement appears to sets forth the mitigation and funding obligations of the Potential Regulated Entities of the BDCP. This section states that “the Potential Regulated Entities’ execution of this Planning Agreement and participation in the BDCP planning process *does not reflect a commitment* on the part of the Potential Regulated Entities to assume the obligation to implement conservation measures that *exceed* minimization and mitigation requirements.” Planning Agreement, p. 9, ¶ 4.1 (emphasis added). A plain reading of this sentence indicates that the Potential Regulated Entities (currently the Department of Water

Resources ("DWR") and U.S. Bureau of Reclamation (the "Bureau") and potentially the Water Contractors) do not intend to do more than merely minimize and mitigate for their impacts to covered species. In other words, the Potential Regulated Entities will only meet the standards for Section 2081 of the Fish and Game Code. This cap on the extent of the Potential Regulated Entities' activities calls into question *how* exactly the BDCP, if it is to serve as an NCCP at all, will provide for the conservation of covered species when the operators of the water system have stated at the outset that they will not commit to operating the water system in a manner consistent with the NCCP's conservation standard. Thus, this preliminary cap on the extent of conservation activities by the parties who control the water system is entirely inconsistent with Sections 2820 and 2835 of the Fish and Game Code. Furthermore, the cap also is inconsistent with CESA because that statute provides that *all* state agencies, including DWR, "shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of [CESA]." Fish & Game Code § 2055; see also § 2052.

In addition, this section sets forth that the parties "expect that the obligation to fund and/or implement any such conservation measures would be roughly proportional to the impact of their Covered Activities on Covered Species and their habitats." Planning Agreement, p. 10, ¶ 4.1. Like the mitigation language discussed above, this cap on funding for conservation measures is not only premature, it is found nowhere within the NCCP Act. This provision provides that virtually every party to the agreement, including DWR, the Bureau and potentially the water contractors (if they become a potential regulated entity), has already had their funding capped to meet only the minimal "no jeopardy" standard. Such a cap does not bode well (to say the least) for the final plan if it is to meet the standard that it must be adequately funded. Indeed, the cap may well be inconsistent with CESA's requirement that the impacts of the authorized take be "minimized and fully mitigated," and that the applicant "ensure adequate funding to implement" these mitigation measures, and to monitor compliance with, and the effectiveness of, these measures. Fish & Game Code § 2081(b)(2), (b)(4).

For these reasons, the parties must delete Section 4.1 of the Planning Agreement.

Attempted Cap on Section 7 measures

Section 4.2 of the Planning Agreement sets forth that the Parties intend that the conservation measures found in the BDCP "will serve as the range of measures to be incorporated into [future] biological opinions" for Covered Activities. Planning Agreement, p. 10, ¶ 4.2. This attempt to cap conservation measures set forth in future biological opinions is entirely inconsistent with the federal ESA. Indeed, the effort to define within the BDCP the entire range of mitigation measures that the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") could impose through a Section 7 biological opinion appears to create *de facto* No Surprises assurances for federal action agencies (e.g., the Bureau). However, the federal ESA, and its implementing regulations, do not provide "No Surprises" assurances under Section 7 of the ESA. See 50 C.F.R. § 17.22(b)(5) ("These [no surprises] assurances cannot be provided to a federal agency."). Therefore, the parties must delete Section 4.2 of the Planning Agreement.

Regulatory Assurances

Section 4.5 of the Planning Agreement sets forth that upon approval of the BDCP, the "USFWS and NMFS will provide [no surprises] assurances to the Potential Regulated Entities." Planning Agreement, p. 10, ¶ 4.5. First, we continue to believe that the current federal "No Surprises" policy and regulations are inconsistent with the federal ESA. Second, as discussed above, the federal ESA clearly does not allow the fish and wildlife agencies to extend "no surprises" assurances to any federal agency. The Bureau is one of the Potential Regulated Entities. Thus, the parties must amend the planning agreement to clarify that such assurances cannot be extended to federal agencies even if they are a Potential Regulated Entity.

In addition, in light of the past litigation over "no surprises" assurances, the USFWS and NMFS are required to provide for the revocation of take permits in order to ensure that the take permits are consistent with Section 7 of the federal ESA. See 50 C.F.R. §17.22(b)(8). However, the planning agreement does not limit the "no surprises" assurances with any discussion about potential permit revocation. Therefore, in order to be consistent with the federal ESA's implementing regulations, the parties must amend Section 4.5 to clarify that any assurances to parties under the federal ESA are limited in the event of permit revocation.

Finally, this regulatory assurances section appears to limit the financial and mitigation commitments of the Potential Regulated Entities for all federal and state conservation laws in addition to the federal ESA. Section 4.3 of the Planning Agreement states that the Potential Regulated Entities may seek approval or authorization under other state and federal fish and wildlife protection laws, such as the Migratory Bird Treaty Act. Planning Agreement, p. 10, ¶ 4.3. While it is possible for the parties to create conservation measures that satisfy the statutory requirements of these other conservation laws, there is nothing in these other laws that provide for "no surprises" assurances that additional mitigation will not be required. Therefore, the parties must clarify that the planning agreement does not extend any "no surprises" assurances to parties as it relates to any other federal or state conservation law (except the state NCCP Act).

Preliminary Conservation Objectives

Section 6 of the Planning Agreement sets forth the preliminary conservation objectives as required by the NCCP Act. Fish and Game Code §2810(a)(4). However, probably because the parties cannot decide whether the BDCP will be an NCCP, these preliminary conservation objectives include a "minimize and mitigate" objective as well as a "no jeopardy" objective. These two objectives are standards for a 2081 permit, not an NCCP and are thus entirely inconsistent with the NCCP conservation requirement. Therefore, in order for Section 6 of the Planning Agreement to be consistent with Section 2810 of the Fish and Game Code, the parties must strike the "minimize/mitigate" and "no jeopardy" objectives from the list of preliminary conservation objectives.

Moreover, other portions of the Planning Agreement are inconsistent with the preliminary conservation objectives. For example, section 6.1.2 states that the BDCP will protect *or* restore certain habitat types and does not refer to contributions to recovery, while the conservation objectives state that the BDCP will be designed to preserve *and* restore habitat *and* contribute to

recovery (problems with the "contribution to recovery" standard notwithstanding). Planning Agreement, p. 12, ¶ 6.1.2.

Covered Species List

Section 6.1.1 of the Planning Agreement discusses the habitat areas and species that may be covered by the BDCP. In addition to the aquatic species, the planning agreement states that other non-aquatic species, such as Swainson's hawk, may be considered as a Covered Species. While we would encourage the BDCP to provide for the conservation of as many imperiled species as possible within the planning area, we are concerned that the limitation of the parties and activities to DWR, the Bureau and water contractors as well as water conveyance and operations does not allow for the coverage of terrestrial species that rely on large amounts of upland habitat. Thus, if the parties are serious about including terrestrial species, it is imperative that the list of parties be expanded to include land management agencies and local governments. Without the inclusion of these additional parties, we do not see how the BDCP will actually provide for the conservation of terrestrial species.

Project Design

Section 6.1.3 of the Planning Agreement sets forth that the BDCP will ensure that each Covered Activity is designed to "avoid and/or minimize and mitigate direct and indirect impacts to Covered Species and their habitats." Planning Agreement, p. 13, ¶ 6.1.3. As we have discussed above, if the BDCP is to meet the NCCP standards, it must meet a higher conservation standard, not the minimal "minimize and mitigate" standard. Thus, in order to meet the NCCP approval standard, the BDCP must design a Covered Activity to provide for the conservation and management of Covered Species. Therefore, in order for the Planning Agreement to meet Fish and Game Code § 2810, the parties must revise Section 6.1.3 of the Planning Agreement to reflect the higher NCCP conservation design standard.

This section of the agreement is even inconsistent with CESA's impact mitigation standard, as it does not require projects to mitigate for cumulative impacts. See Fish & Game Code § 2018(b)(2) (requiring minimization and full mitigation of "*all* impacts on the species that result from any act that would cause the proposed taking") (emphasis added).

Independent scientific input

Fish and Game Code § 2810(a)(5) requires that every NCCP planning agreement establish a *process* for the inclusion of independent scientific input to assist plan participants. Section 7 of the Planning Agreement states that the "process used to develop the BDCP will incorporate independent scientific input and analysis." Planning Agreement, p. 13, ¶ 7. However, this section fails entirely to describe the "process for the inclusion of independent scientific input." There is no mention of who will choose the independent scientists, when those scientists will be brought into the BDCP planning process, how the independent scientists will operate (e.g., will there be a facilitator, a lead scientist, etc.), what the charge will be of the scientific advisors, or how the scientists' advice will be captured, reported and integrated into the decision-making process. Therefore, since the Planning Agreement includes **no** information as to the *process* for scientific

advice, the current version of the planning agreement does not comply with Section 2810(a)(5) of the Fish and Game Code. The parties must revise the Planning Agreement to meet this requirement, including answering the questions posed above. We urge the parties to consult the Department of Fish and Game's "*Guidance for the NCCP Independent Science Advisory Process*," dated August 2002 (attached), as they draft this portion of the planning agreement.

Steering Committee

Section 7.4.1.1 of the Planning Agreement sets forth the details of the BDCP Steering Committee. While we applaud the creation of a Steering Committee that includes more than just the fish and wildlife agencies and the potentially regulated parties, we remain concerned that the current Steering Committee structure and process does not provide a truly collaborative effort. While the inclusion of all interested parties is the first step toward successful collaboration, the critical next step for true collaboration lies in the balance of power within the collaborative effort. Herein lies the problem with the BDCP Steering Committee. According to the Planning Agreement, while the Steering Committee will "strive" for consensus, if any party raises a strong objection that cannot be resolved, all decision-making will shift to the Potential Regulated Entities, in consultation with the fish and wildlife agencies, shutting the Non-governmental Organizations ("NGOs") out of the decision-making process entirely. Thus, the balance of power is inequitably shifted toward the Potential Regulated Entities, severely reducing the bargaining power of the NGOs within a "consensus" process.

Some have suggested that the NGOs have significant sway within the currently designed BDCP process because they could always opt for litigation should they disagree with the final BDCP. However, this argument is not persuasive. Litigation to ensure that the fish and wildlife agencies comply with the law is of last resort and not a very strong reason for why the NGOs should be excluded from the decision-making in the event of disagreement. Indeed, including NGOs in this process is likely to reduce the risk of litigation, while excluding them is likely to increase the risk. Therefore, the planning agreement must be revised to provide a true consensus building process for decision-making by the Steering Committee instead of the automatic default that cuts the NGOs out of the decision-making entirely.

In addition to the revisions to rectify the Steering Committee decision-making process, we question why Section 7.4.1.1 provides that only the staff and consultants of the fish and wildlife agencies and Potential Regulated Entities will provide technical expertise and share information for the development and implementation of the BDCP. See Planning Agreement, p. 15. Is there some reason why the staff and consultants of the NGOs are not included in this provision? This will render the BDCP biased from the outset. Therefore, we recommend that the technical expertise and information provision of Section 7.4.1.1 be expanded to include the staff and consultants of the NGO Steering Committee members.

Interested Observers

Section 7.4.1.3 of the Planning Agreement states that the parties have "recognized a group of 'Interested Observers,' representing stakeholder interests. These Interested Observers will be provided notice of the Steering Committee meetings and invited to attend those meetings." We

request that the planning agreement identify who exactly are these "Interested Observers." Every other group has been identified through this planning agreement except for the category of "Interested Observers."

Public Participation and Outreach

Sections 7.4.2 – 7.4.5 of the Planning Agreement set forth the Public Participation and Outreach process for the development of the BDCP. For the most part, these provisions provide a good framework for public participation and outreach. However, we do have a few suggested revisions to these sections in order to better comply with Section 2815 of the Fish and Game Code. This section requires that the planning agreement set forth a public participation process "throughout" the plan development that shall give interested parties "adequate opportunity" to provide input. First, while Section 7.4.2 of the Planning Agreement sets forth that the parties will hold public meetings to present key decisions regarding the preparation of the BDCP, there is no detail regarding how many meetings will be held, where those meetings will be held, or how often those meetings will be held during the planning process. In order to ensure that the public participation provision meets the minimal NCCP standards, the parties should provide greater detail of the public participation process "throughout" the plan development.

In addition, Section 7.4.3 of the Planning Agreement states that "[n]ot all documents drafted during preparation of the BDCP will be distributed for public review." Planning Agreement, p. 16, ¶ 7.4.3. Indeed, the Parties will choose which documents generated during the planning process shall be "public review drafts." *Id.* We are concerned that the planning agreement will allow important document to be withheld simply because the Parties decided that they are not "public review drafts." There is no definition of what the Parties would consider a "public review draft." In the absence of guidance within the planning agreement, we are concerned that the parties may abuse this provision, thus failing to guarantee that the public will have access to all of the information important to decision-making. Therefore, we urge the parties to include a definition of "public review drafts" in the planning agreement.

Interim Project Processing

During the negotiations over the 2002 revisions to the NCCP Act (embodied in SB 107), there was a great deal of discussion about the issue of interim project development since it presented a significant problem in the development of NCCPs in Southern California. *See* Natural Resources Defense Council, "Leap of Faith: Southern California's Experiment in Natural Community Conservation Planning" (1997). The NCCP Act presently *requires* that the fish and wildlife agencies review discretionary projects that potentially conflict with the preliminary conservation objectives in the planning agreement. Fish & Game Code § 2810(b)(8). This review must occur prior to, or as soon as possible after, the project application is deemed complete pursuant to Government Code § 65943. The wildlife agencies must recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives of the NCCP. As part of the interim development review process, these wildlife agencies must take into consideration the information developed by the independent scientific review process created by Fish and Game Code § 2910(b)(5). *See* Fish and Game Code § 2810(b)(8).

For the most part, the Planning Agreement meets the interim project review requirements of the NCCP. However, there is one glaring exception – an exception that seems to create an enormous loophole for a large number of significant projects. Section 7.6 of the Planning Agreement states that “MOA Projects will **not** require *separate or additional review* pursuant to the interim project process” set forth in the planning agreement. Planning Agreement, p. 17, ¶ 6 (emphasis added). MOA Projects include the SDIP, the CVP-SWP Intertie, Levee Subventions, Special Levee Projects, and the Franks Tract Pilot Project. A complete list of these projects is found in Exhibit B to the Planning Agreement. Furthermore, the Planning Agreement appears to give the parties unlimited discretion to include other, unspecified interim projects beyond this list. See Planning Agreement, p. 17, ¶ 7.6 (“[o]ther projects or activities within the Planning Area that are proposed by the Potential Regulated Entities that require discretionary approvals will be subject to the interim project process”).

A plain reading of Section 7.6 of the Planning Agreement in addition to Sections 7.6.1 (Notification Process for Interim Projects) and 7.6.2 (Fishery Agency Review of Interim Projects) appears to allow the MOA projects to move forward without an assessment by the fish and wildlife agencies to (1) determine if the projects are potentially in conflict with the preliminary conservation objectives and (2) if the project do conflict, provide recommended mitigation measures and alternatives that would help achieve the preliminary conservation objectives. While some of the parties involved in the drafting of the Planning Agreement have assured us that the fish and wildlife agencies will review all projects, including the MOA projects that still have environmental review and documents to be completed, to ensure that the BDCP’s conservation objectives will not be undermined. However, we remain concerned that the plain language of this binding agreement directly contradicts the assurances of future review of MOA projects.

Section 2810(d)(8) clearly requires that *all* discretionary projects within the Plan Area subject to CEQA be reviewed through an interim project process. The Planning Agreement’s exemption for all MOA Projects is directly in violation of Section 2810(d)(8). Moreover, as a practical matter, allowing these major projects to go forward without wildlife agency review for consistency with the preliminary conservation objectives of the BDCP is very likely to defeat the entire purpose of the plan. Therefore, the parties must revise Section 7.6 of the Planning Agreement to ensure that all discretionary projects that are still undergoing environmental review will be reviewed by the fish and wildlife agencies through an interim review process.

Interim project review does not entail a convoluted or burdensome process for project applicants. Indeed, much of this review can take place during the course of ordinary CEQA review or permit review.

Interim Take

While Section 7.7.2 of the Planning Agreement sets forth a provision that allows for the consideration of past mitigation and conservation actions by the parties, there is no corresponding provision that requires the parties to consider and authorize the cumulative take of covered species by interim projects. Fish and Game Code Section 2810(b)(8) provides that “[a]ny take of candidate, threatened or endangered species that occurs during the interim period shall be included in the analysis of take to be authorized under an approved plan.” Thus, in order to

comply with Fish and Game Code Section 2810(b)(8), the parties must include a provision in the planning agreement that requires the analysis and incorporation of interim take into the BDCP.

Summary

We strongly support the creation of an NCCP for the Bay Delta region. This region, and the fish and wildlife that reside within this region, are in a crisis. A conservation plan should provide significant benefits to the fish and wildlife, the agencies, the water contractors and other local interests. The comments in this letter are offered not to undermine the creation of the BDCP, but to ensure that the planning process will meet the applicable statutory standards and truly meet the needs of the fish and wildlife it purports to address. As we stated at the beginning of our letter, we applaud and encourage the efforts of the BDCP parties.

Thank you for the opportunity to comment on this planning agreement. Please keep us informed of this process. If you have any questions or comments, please do not hesitate to contact us.

Sincerely,



Kim Delfino
California Program Director
Defenders of Wildlife



Jim Metropulos
Legislative Representative
Sierra Club

Cc: Karen Scarborough, Resources Agency
Jerry Johns, Department of Water Resources
Sen. Mike Machado



ENVIRONMENTAL DEFENSE

finding the ways that work

October 2, 2006

Mr. Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

Re: Comments on the Proposed Planning Agreement for the Bay Delta Conservation Plan (dated September 8, 2006)

Dear Mr. Cantrell:

Environmental Defense appreciates the opportunity to comment on the proposed Planning Agreement which is intended to help shape the development of the Bay Delta Conservation Plan (BDCP). As a member of the Steering Committee, we are invested in developing a conservation plan that will result in the successful recovery of key species in the Bay-Delta. Our comments serve to further reiterate our goals for the conservation plan as it moves forward.

Environmental Defense's objective in participating in the BDCP process is to work towards recovering key species in the Bay-Delta by collaboratively developing a plan consistent with the Natural Communities Conservation Planning Act (NCCPA). As you are aware, the health of the Bay-Delta ecosystem is at an important crossroads: do we continue with the status quo and face certain species extinction or do we do things differently and create a plan to recover this threatened ecosystem? With a recovery standard in place through an NCCP, this conservation plan could help alter the course of this failing system by developing a durable conservation strategy premised on science, monitoring and adaptive management. Any standard less than species recovery will not reap anywhere near the same benefits. While the Planning Agreement is unfortunately ambiguous on whether the BDCP is indeed an NCCP, the State Legislature has been clear that they will not settle for anything else. For the benefit of all involved, we strongly recommend that the standard be clearly defined and decided on early in this next stage of developing the conservation plan so that it is clear what exactly it is that we are planning for.

Among other troublingly ambiguous language in the Planning Agreement is that pertaining to the review of interim projects, found in Section 7.6. The current language, which states that the interim project process is set up to "help ensure that new major

discretionary projects approved or initiated in the Planning Area before completion of the Plan are consistent with the preliminary conservation objectives (section 6) and do not compromise successful completion and implementation of the Plan," is unclear and insufficient. Presumably, the conservation objectives for an NCCP/HCP would be different than that for a CESA 2081 permit, and since the Planning Agreement does not explicitly state what the standard is for the conservation plan, the language for this section is too ambiguous. We therefore recommend that clause (1) immediately following the colon in the second sentence of Section 7.6 be amended to read as follows:

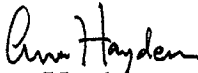
(1) help ensure that new major discretionary projects approved or initiated in the Planning Area before completion of the Plan are consistent with the preliminary conservation objectives (section 6) and do not compromise successful completion and implementation of a Plan that meets the substantive requirements of the NCCPA;

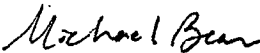
In addition, we strongly recommend the following language be added to the end of Section 7.6 to help clarify the intent of the review process:

The parties agree that the project-specific environmental review of the MOA Projects under CEQA, CESA, NEPA and ESA will be sufficient to evaluate whether the MOA Projects will be consistent with BDCP preliminary conservation objectives under an NCCP. Nothing approved in the interim projects will preclude the ability to meet the recovery goals of an NCCP.

Thank you for considering these comments. We look forward to beginning this next stage in the development of the Bay Delta Conservation Plan. If successful, the BDCP has the potential to put the Bay-Delta on the road to recovery and could provide a larger framework for resolving other Delta-related issues.

Sincerely,


Ann Hayden
Water Resource Analyst


Michael Bean
Senior Attorney



California Sportfishing Protection Alliance

"An Advocate for Fisheries, Habitat and Water Quality"

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2 October 2006

Mr. Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

VIA: Electronic Submission
Hardcopy if Requested

RE: Draft Planning Agreement for the proposed Bay Delta Conservation Plan
HCP/NCCP

Dear Mr. Cantrell

The California Sportfishing Protection Alliance and Watershed Enforcers (CSPA) has reviewed the Draft Planning Agreement for the proposed Bay Delta Conservation Plan HCP/NCCP (BDGP) and submits the following comments.

CSPA is a 501(c)(3) public benefit conservation and research organization established in 1983 for the purpose of conserving, restoring, and enhancing the state's water quality and fishery resources and their aquatic ecosystems and associated riparian habitats. CSPA has actively promoted the protection of water quality and fisheries throughout California before state and federal agencies, the State Legislature and Congress and regularly participates in administrative and judicial proceedings on behalf of its members to protect, enhance, and restore California's degraded water quality and fisheries. CSPA members reside, boat, fish and recreate in and along waterways throughout the Central Valley.

CSPA endorses and incorporates by reference the detailed comments submitted by Defenders of Wildlife/Sierra Club, Planning and Conservation League and Federation of Flyfishers. Beyond those excellent comments, however, we are concerned that the proposed planning agreement represents a serious potential conflict of interest.

The U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) are identified as "Potential Regulated Entities." The California Department of Fish and Game (DFG) and U.S. Fish and Wildlife Service (USFWS) are identified as "Fishery Agencies." However, DFG and DWR are both departments of the California Resources Agency and USFWS and the Bureau are agencies of the U.S. Department of the Interior.

DWR has long ignored its nondiscretionary duty, pursuant to the California Endangered Species Act (CESA), to either obtain an Incidental Take Permit or a

Consistency Determination from the Director of DFG for its take of listed species. Nor, has DFG demanded that its sister department submit such a request. As a result, CSPA has been compelled to prepare a lawsuit against DWR for its blatant failure to comply with the most fundamental requirements of CESA. Failure of the USFWS to adequately comply with federal Endangered Species Act (ESA) requirements compelled an environmental coalition to institute legal action against the Service over the OCAP Biological Opinion. Indeed, in recent forums, both the Bureau and USFWS have proclaimed that they speak with "one voice." The continuing decline of the Bay-Delta estuary is littered with administrative policy decisions trumping sound science and explicit procedural requirements of both ESA and CESA.

CSPA believes any planning agreement must clarify and resolve the inherent conflict of interest that inevitably occurs when regulator and regulated operate under the same administrative umbrella. Otherwise, the BDCP will be viewed as little more than a transparent end-run around ESA and CESA in order to insulate the state and federal project facilities and exporters from the requirements of those statutes. Unless a firewall can be erected between the Fishery Agencies and Regulated Entities, the BDCP, if implemented, will likely exacerbate the current and long-term decline in the health of the estuary.

Any comprehensive BDCP must also address redirected impacts. Water exported from the Delta frequently causes or contributes to redirected impacts via tailwater or groundwater migration into surface waters in other watersheds. The planning agreement must acknowledge and make provisions for addressing redirected impacts.

CSPA respectfully urges rejection of the current Agreement and development of a new document that meaningfully addresses the concerns detailed in the Defenders of Wildlife/Sierra Club, Planning and Conservation League and Federation of Flyfishers letters and resolves redirected impacts and conflicts of interest issues. It would certainly alleviate numerous concerns if the Fisheries Agencies could meaningfully enforce the statutory requirements of ESA/CESA prior to embarking upon an alternative track.

Thank you for considering these comments. If you have questions or require clarification, please don't hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Jennings", written in a cursive style.

Bill Jennings, Executive Director
California Sportfishing Protection Alliance

October 2, 2006

Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95816

Sent via fax: (916) 651-7824 and e-mail: scantrrel@dfg.ca.gov

RE: Draft Planning Agreement for the proposed Bay Delta Conservation Plan HCP/NCCP

The undersigned organizations appreciate this opportunity to comment on the Draft Planning Agreement (Agreement) for the proposed Bay Delta Conservation Plan HCP/NCCP (BDCP).

We commend the Department of Fish and Game for its recognition of the need for serious actions in response to the declining ecological health of the California Bay-Delta Estuary. An HCP/NCCP for the Bay-Delta and its tributaries could improve the long-term viability and sustainability of the region, providing tangible improvements to the environment and to public health.

Unfortunately, the BDCP, if carried out according to the current draft of the Planning Agreement, will not achieve those essential outcomes and will instead exacerbate the current and long-term decline in the health of the estuary.

We therefore urge the Department of Fish and Game and all other potential parties and signatories not to adopt the Agreement until the following concerns are fully addressed:

1) The Agreement proposes to provide decades of assurances while ignoring the current ecological collapse in the Delta.

Permanent changes in water project operations are necessary today to reverse the continuing ecological collapse and avoid the impending extinction of endangered Delta species. These actions must occur immediately, and cannot be delayed while agencies focus on negotiating decades-long assurances for water project operations under the BDCP. The Agreement should officially recognize the imperiled state of the estuary and explicitly call for implementation of immediate modifications of water project operations and other restoration activities necessary to stabilize and improve the ecological health of the region.

2) The Agreement does not commit to recovery of endangered species.

Currently, the Agreement allows the Potential Regulated Agencies to seek take authorizations under either the Natural Community Conservation Planning Act (NCCPA), which requires actions that provide for the recovery of endangered species, or the California Endangered Species Act (CESA) sections 2080.1 and 2081, which only require mitigation of impacts.

The health of the Bay Delta Estuary has been too severely degraded to sustain the "business as usual" approach embodied in the CESA mitigation standard. In addition, both state and federal regulatory agencies are required by law to provide for the recovery of endangered species¹. To fulfill those obligations, the agencies must ensure that the entities they regulate undertake actions that lead to species recovery. The agencies must therefore require that the BDCP meet the recovery standards outlined in the NCCPA before granting any assurances.

The NCCPA recovery standards are stronger than implied in the Agreement. The Agreement states that the goal of the BDCP is to "contribute to recovery of endangered species" (p. 8). The NCCPA only allows take permits for species whose "conservation and management is provided for in a natural community conservation plan (Fish and Game Code Section 2835)" and defines conservation as actions that are necessary to provide for recovery of the species, not simply contribute to recovery (Fish and Game Code Section 2805 (d)). References to "contribution to recovery" should therefore be removed from the Agreement.

In addition, because of the pressing need to ensure full recovery of endangered species in the project area, vague commitments to only implement conservation actions proportional to a particular entity's impacts and to undertake an NCCP if "practicable" should be replaced to include a firm commitment on the part of all parties to the preparation of an NCCP and implementation of all actions necessary to recover endangered species.

3) The Agreement encourages increased export of freshwater from the Delta.

The Agreement specifically allows major damaging projects such as the SDIP and the SWP/CVP Intertie, which together could increase water exports out of the Delta by over a million acre feet per year, to proceed, regardless of their impact on the health of the estuary. ("The Parties acknowledge and agree that MOA Projects will not require separate or additional review pursuant to the interim project process set forth in this section." p.17) This exemption violates the interim project review process outlined in Fish and Game Code section 2810 (b) (8). The Agreement must require that wildlife agencies review all proposed projects affecting the Delta, including the MOA projects, and reject any that will degrade the environment, prevent species recovery, or compromise successful completion of the BDCP. Failing to do so leaves the Agreement legally vulnerable, threatens the health of the Delta, and interferes with the establishment of an adequate environmental baseline.

4) The Agreement allows exporters to continue damaging upstream areas.

By excluding upstream areas from the BDCP Planning Area, the Agreement allows the water exporters to continue reservoir operations that negatively impact species in the Delta and upstream and receive assurances for additional pumping without being held responsible for the effects of pumping activities on upstream areas.

¹ (See 16 U.S.C. §§ 1536(a)(1) (requiring federal agencies to conserve listed species), 1532(3) defining "conservation" to include species recovery), 1533(f) (requiring recovery plans); Fish & Game Code § 2052 ("it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat"). Similarly, the CVPIA mandates recovery of populations of several anadromous species, including striped bass. Pub. L. 102-575 (1992), 106 Stat. at 4706-31, §§ 3406(b)(1) (requiring doubling of anadromous fish populations), 3403(a) (defining anadromous fish). California also has defined salmon population recovery as an important goal. (Fish and Game Code §§ 6900-6903.5.)

To recover endangered species, especially migratory species such as salmon, the Agreement must link actions in the Delta with the rivers that flow into the estuary. Negotiating assurances for water exports from the Delta without addressing the health and sustainability of the upstream watersheds will only ensure species continue to collapse. The Agreement must therefore include upstream areas in the BDCP Planning Area and commit to implementing system-wide changes in water project operations and other necessary restoration actions that improve conditions for species recovery both upstream and in the Bay-Delta.

5) The Agreement does not answer the fundamental question, "How much water does the Bay Delta Estuary need under a variety of conditions to maintain a healthy ecosystem?"

As the current ecosystem collapse in the Delta demonstrates, the present understanding of the Delta's needs are insufficient for granting the type of long term assurances proposed in the BDCP. Regulatory agencies simply do not know what resources the Estuary needs for recovery or for sustainability. The BDCP must determine first and foremost what conditions are necessary to sustain a healthy ecosystem, including how much water must remain in the Estuary and how much would then be available for diversions and exports. Once this essential information is attained, actions should only be permitted within those known parameters. The Agreement aims to provide long term assurances for water exports without first determining those parameters and must be revised accordingly.

6) The BDCP decision making process is weighted in favor of the water exporters.

The Agreement empowers water exporters to decide how to proceed on any issue where the full steering committee cannot reach agreement. This structure clearly favors exporter priorities above actions necessary to achieve a healthy ecosystem. This allows the process to easily become "hijacked" and severely limits the ability of public agencies and public interest organizations to shape the development of the BDCP.

The Agreement must ensure that the health of estuary drives decision making. Accordingly, exporters should not be granted ultimate decision making power and steering committee members who advocate for the environment must be allowed equal footing in the decision making process.

7) The BDCP is being rushed to provide assurances at the expense of the environment.

While most conservation plans take five to ten years to develop, the BDCP is scheduled to be completed in only three – with CEQA and NEPA review completed by early 2009. This timeline is inadequate especially considering the size, complexity and fragility of the region. The Agreement must articulate that the BDCP will be prepared according to the needs of the estuary, not the desire for rapid implementation of increased pumping regimes.

Sample Plans	Length of development process	Species covered
Cedar River Watershed HCP	6 years	Total of 83 species, including anadromous fish such as Chinook salmon and steelhead trout
Lower Colorado River	10+ years	27 species from three different states

Multi-Species Conservation Plan		
Coachella Valley MSHCP-NCCP	10+ years	27 species and their corresponding 27 natural communities
Bay-Delta Conservation Plan	Projected completion in 3 years	Aquatic, riparian and floodplain species including Chinook salmon, steelhead trout, Delta smelt, bank swallow, giant garter snake, etc.

8) The BDCP will bypass other public processes that are investigating how to achieve a sustainable Delta.

The Delta faces severe threats from water project operations, sea level rise, seismicity, subsidence, and urban encroachment. Several efforts including the Delta Risk Management Strategy Study and the Delta Vision Process have been recently initiated to analyze issues of risk and uncertainty in the Delta and develop broadly-supported long-range plans for sustainable management of the Delta's many resources. Although these efforts are intended to shape future actions, the BDCP's timeline is sufficiently abbreviated that it will likely be finalized before these important processes have developed recommendations. The Agreement must include a commitment to incorporate emerging science and implement Delta Vision policy recommendations.

It must also outline how operations and permits will be modified in response to changing environmental conditions or unforeseen circumstances, identifying clear decision making mechanisms and processes for adaptive management that will achieve species recovery. For example, the Agreement should specify that if non-listed species become listed after adoption of the BDCP, the take authorization for those species will be re-examined.

Conclusion

The Bay-Delta Estuary, the largest estuary on the west coast of the Americas, is a natural treasure akin to the Florida Everglades, the Mississippi Delta, and the Chesapeake Bay. It provides habitat to millions of waterfowl and aquatic species, offers recreational opportunities including fishing, boating, and windsurfing, and sustains an historic agricultural tradition. It is an irreplaceable component of our natural heritage and a public trust resource for all Californians.

It is also an imperiled environment experiencing an unprecedented ecological collapse.

To remedy this situation, state and federal wildlife agencies must establish a new level of accountability, demanding immediate and ongoing modifications in water project operations to reduce their impacts on the environment to non-detrimental levels. They must ensure that the public is adequately informed and allowed to participate fully in all important management decisions. Lastly, they must articulate and implement a viable long-range plan for a sustainable estuary.

This Planning Agreement for the BDCP fails in all those regards and must be rejected. It does not commit to recovery of endangered species and instead allows extremely harmful projects

to proceed. It ties the hands of the regulatory agencies while leaving fundamental questions concerning how much water can be sustainably removed from the ecosystem unanswered. It rushes to provide assurances to the detriment of the environment.

For these reasons we respectfully urge you to reject the current Agreement and develop a new document that addresses the above concerns and can lead to recovery of this important resource.

Please notify us of how you plan to proceed on these issues and provide a rationale for your decision.

Thank you,

Matt Vander Sluis
Planning and Conservation League

Geoff McQuilkin
Mono Lake Committee

Carolee Krieger
California Water Impact Network

Cc:
Karen Scarborough, Resources Agency
Joe Grindstaff, California Bay-Delta Authority
Steve Thompson, U.S. Fish and Wildlife Services
Russ Strach, National Marine Fisheries Service
Senator Mike Machado
Assemblywoman Lois Wolk
Bill Jennings, California Sportfishing Protection Alliance



NATURAL RESOURCES DEFENSE COUNCIL

October 2, 2006

Via Email and U.S. First Class Mail

Mr. Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento, CA 95814

Re: Proposed Planning Agreement for the Bay Delta Conservation Plan

Dear Mr. Cantrell:

We are writing on behalf of the Natural Resources Defense Council ("NRDC") and its more than 120,000 members in California with regard to the Proposed Planning Agreement for the Bay Delta Conservation Plan ("BDCP"). We have significant concerns about the Proposed Planning Agreement and oppose implementation in its current form. The fundamental flaw in the Proposed Planning Agreement is that it fails to ensure conservation and recovery of affected listed species, while guaranteeing assurances to regulated entities "that neither the USFWS nor NMFS will require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for Covered Species, without the consent of the affected Potential Regulated Entities." Proposed Planning Agreement, pp. 10-11. This unbalanced approach – providing guarantees to the entities harming listed species that their activities can continue unabated long into the future without a countervailing conservation benefit to the listed species – dooms this effort from the start.

Instead, we recommend that the Proposed Planning Agreement be modified to ensure that the BDCP will provide conservation commitments commensurate with the promised level of take protection and satisfy all the relevant requirements of state and federal law, including the Natural Community Conservation Planning Act ("NCCPA"), Cal. Fish & Game Code §§ 2800 *et seq.*, and the federal Endangered Species Act ("ESA").

I. UNMET STATUTORY REQUIREMENTS

Although titled a "Conservation Plan," the Proposed Planning Agreement for the BDCP does not require the ultimate plan to conserve or recover listed species. Instead, it explicitly disavows such a commitment, stating that the Proposed Planning Agreement "does not reflect a commitment on the part of the Potentially Regulated

Entities to assume the obligation to implement conservation measures that exceed minimization and mitigation requirements." Proposed Planning Agreement, pp. 9-10. It also states that "[t]he Potential Regulated Entities have not yet determined whether it would be feasible or practicable to implement the BDCP, if it is developed, to meet the substantive requirements of the NCCPA." Proposed Planning Agreement, p. 7. Finally, it fails to address the conservation and recovery requirements of the ESA. The Agreement should be modified to require that the BDCP comply with these statutes and impose conservation requirements equal to the promised level of take assurances.

A. The NCCPA

The NCCPA defines California's legal framework for tackling the type of issues that the BDCP is seeking to resolve. It allows for a multi-species, ecosystem-based approach to "protecting California's natural diversity while reducing conflicts between protection of the state's wildlife heritage and reasonable use of natural resources for economic development." Fish & Game Code § 2801(c).

However, unlike the Proposed Planning Agreement, the NCCPA requires balance and proportionality, allowing DFG to "provide assurances for plan participants commensurate with long-term conservation assurances and associated implementation measures pursuant to the approved plan." *Id.*, §2820(f). Importantly, the NCCPA also envisions that this balance and proportionality would be maintained over the life of the plan, requiring DFG to identify terms and conditions specifying the actions the Department would take if the plan participants fail to maintain rough proportionality between impacts on habitat or covered species and conservation measures. *Id.*, § 2820(b)(3). This type of requirement represents a crucial aspect of any future BDCP in light of the vast uncertainties regarding the future of the Delta and the lessons of the CALFED program. *See below.*

The NCCPA also focuses less on the minimal level of protection required to keep listed species from going extinct – which appears to be the focus of the BDCP under the Proposed Planning Agreement – and more on identifying and implementing the measures necessary for long-term protection, conservation, and sustainability of species, ecosystems and habitats. Fish & Game Code § 2820(a). The restoration of long-term ecosystem health and sustainability should be the goal of any "Bay Delta Conservation Plan," not merely the minimal amount of oxygen required to keep the patient on indefinite life support.

The NCCPA has been successfully implemented for myriad projects across the State. It represents a useful framework for addressing ecosystem protection and resource demands in the Delta. The Proposed Planning Agreement should be amended to require that any BDCP comply with the NCCPA.

B. The ESA

The Proposed Planning Agreement states that the planning goal "is intended to reflect the constraints inherent to the BDCP that may limit its capacity to ensure the recovery of Covered Species." Proposed Planning Agreement, p. 8. The Agreement is silent on what those constraints may be, and how those constraints may limit the BDCP's "capacity" to ensure the recovery of listed species. However, we note that several federal agencies are parties to the Proposed Planning Agreement, including the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Bureau of Reclamation. The federal Endangered Species Act places a clear obligation on those federal agencies not only to prevent the extinction, but to *bring about the recovery*, of species threatened or endangered with extinction. See generally *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) ("TVA"). Each of these agencies must give endangered species "priority" over their "primary missions" so as to "reverse the trend toward species extinction, whatever the cost." *TVA*, 437 U.S. at 185, 184 (emphasis added). Anything less fails to meet the requirements of the ESA.

The Proposed Planning Agreement asserts that the BDCP is going to "meet the requirements of State and federal fish and wildlife protection laws ... and provide a basis for State and federal authorizations for the take of Covered Species." Proposed Planning Agreement, p. 8. If so, the BDCP must satisfy the recovery requirements of the ESA. The ESA's recovery requirements are much more than amorphous goals, and impose specific obligations on the part of federal agencies, including Section 7's prohibition on "adverse modification" of critical habitat which embodies Congress's intention to ensure that species recover to the point where the threat of extinction is removed. *Gifford Pinchot*, 378 F.3d. at 1069; *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001). Section 7 also imposes an affirmative obligation on federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed" under the Act. 16 U.S.C. § 1536(a)(1). A program of "conservation" is one that brings the species to the point of recovery and delisting. *Id.* § 1532(3). Finally, a Habitat Conservation Plan ("HCP") developed under the ESA must be consistent with any approved recovery plans for affected species. The National Marine Fisheries Service has just announced its intention to develop recovery plans for listed salmon and steelhead that inhabit the Delta. 71 Fed. Reg. 53421 (Sept. 11, 2006). The BDCP must be developed in accordance with these and other existing recovery plans, and must ensure that the ultimate Plan is consistent with the recovery plans.

The Proposed Planning Agreement should be amended to ensure that it will actually "meet the requirements of State and federal fish and wildlife protection laws" by requiring the BDCP to ensure the conservation and recovery of affected listed species.

II. DELTA VISION PROCESS

The Proposed Planning Agreement does not clarify the relationship of the BDCP process and the newly-launched Delta Vision process. Both of these processes are designed to develop long-range plans for the Delta addressing, in part, ecosystem and water supply issues, although they have very different structures and scope. Given the short planning timeline that has been discussed for the BDCP, we are concerned that this effort could interfere with the Delta Vision process. For example, the implementation of some interim actions and the establishment of long-term assurances prior to the completion of the Delta Vision process could interfere with the effort to develop and implement a plan to address many issues related to the future of the Delta. Climate change also presents significant uncertainties for the future of the Delta, through likely effects including sea level rise, changes in hydrology and more extreme weather events. Given the uncertainty currently facing the Delta, as identified by Professor Mount, and the biological decline seen in recent years, we do not believe that this is an appropriate time to consider long-term Delta assurances. NRDC recommends that the BDCP process follow, rather than precede, a Delta Vision process.

III. USER FEES

Exhibit B includes language that would interfere with the implementation of water-related user fees and a beneficiary pays approach to financing, which have been called for by the state legislature, Congress, the state administration, the CALFED ROD and many stakeholders. Specifically, section VII(1) provides for the termination of the MOU "if the State imposes fees or an involuntary financial obligation on any water users or utility signatory to the MOA." NRDC recommends that this language be deleted. We believe that properly designed user fees are long overdue. For example, the public is bearing the cost of the EWA, without additional contributions from Delta exporters, despite the fact that, as a result of inadequate resources, the EWA is managed solely to comply with ESA requirements. In addition, existing assurances require an adequate level of ERP funding, however, water user contributions do not reflect these benefits regarding assurances. The termination section in Exhibit B also requires a constitutional amendment (section VII(3)), as part of any acceptable package, thus establishing an extraordinarily high bar for user fees. Given that the BDCP process could take decades, the current language could interfere with the implementation of user fees for many years. In fact, by offering such broad protection against user fees, this language could provide an unintended incentive for water users to extend the planning period.

IV. ADAPTIVE MANAGEMENT

The Proposed Planning Agreement discussion regarding adaptive management should be strengthened. We have two specific recommendations.

A. CALFED

First, the adaptive management program included in the agreement should include retrospective, as well as prospective, elements. Specifically, the draft does not include any discussion of the need for the adaptive management effort to learn from the implementation of CALFED. The CALFED program designed and implemented a program very similar to that contemplated by the draft planning agreement. The ROD included assurances, ecosystem restoration goals, Delta assurances, an EWA with specified levels of assets, and an adaptive management program. Several of these efforts, such as achieving the level of EWA assets required by the ROD, have encountered significant obstacles. To date, CALFED has not assessed all of these obstacles. For example, the CALFED Program has not yet responded adequately to the Environmental Defense report *Finding the Water*, which revealed that implementation of the CALFED Delta package has fallen 500,000 acre-feet annually short of the amount of environmental water required by the ROD. In order to design the BDCP to achieve a greater level of success, the adaptive management effort should include an evaluation of CALFED Delta assurances, particularly the biological decline in the Delta and the challenges in achieving the level of EWA assets required by the ROD.

B. Reopener

Second, if the BDCP effort moves forward, the final Planning Agreement should include a more explicit reopener, providing for the modification of the agreement and, if necessary, the termination of assurances, to address unforeseen developments such as unanticipated biological declines, additional listings, and a failure to implement environmental programs required by the final HCP/NCCP.

V. 8,500 AND DELTA DIVERSIONS

NRDC believes that 8,500 should not be included as an interim project. As NRDC and several other organizations indicated in a letter to fisheries agencies and the project operators, dated June 5, emerging science suggests that water management has played a significant role in the decline of Delta fisheries. Approval of 8,500 could undermine the recovery of the Delta and its fisheries, as well as the Delta Vision process. In addition, the Proposed Planning Agreement is not clear regarding the level of analysis to which interim actions will be subjected. We recommend that this level of analysis be clarified, to include compatibility with a Delta Vision process and the full recovery of the Delta. We recommend a delay in the implementation of 8,500. In order to avoid potential conflicts with Delta recovery and the Delta Vision process, we also recommend that the final Planning Agreement clearly state that a reduction in total Delta diversions may be required.

VI. UPSTREAM IMPACTS

If this effort moves forward, we recommend that the final Conservation Plan address the upstream environmental impacts of Delta operations. For example, increased exports have the potential to cause impacts upstream, through the re-operation of CVP and SWP reservoirs far from the Delta. If the BDCP does not address upstream impacts, it must include a specific provision indicating that future efforts designed to address the impacts of upstream operations may result in additional constraints on Delta operations.

VII. TIMELINE

The Proposed Planning Agreement does not include a timeline for the completion of a BDCP. We recognize that developing a realistic timeline for this effort is a difficult task. We also believe that the 2-3 year timeline, which many participants have discussed informally, is unrealistic. Developing a realistic timeline would assist in the identification and avoidance of potential conflicts. Some of those potential conflicts are discussed elsewhere in this letter.

VIII. INDEPENDENT SCIENCE

We believe that the Planning Agreement should provide greater clarity regarding the roles of the consultants who may be retained to develop the BDCP and the independent, particularly academic, scientists who can provide needed outside review of this process.

IX. INTERIM APPROVALS BY REGULATORY AGENCIES

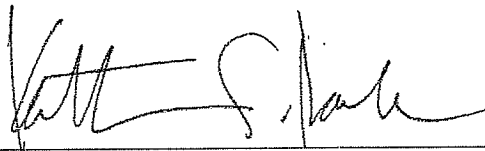
In order to ensure that the BDCP produces a result that will be useful to the regulatory agencies, we recommend that the Proposed Planning Agreement be modified to provide for comprehensive, written comments from the fisheries agencies regarding the adequacy of the study design.

Thank you for considering our comments.

Sincerely,



Barry Nelson
Senior Policy Analyst



Katherine S. Poole
Senior Attorney

Beth Gerbutavicius

From: gary@garlaine.com
Sent: Tuesday, October 03, 2006 7:13 AM
To: 'Scott Cantrell,'
Subject: Draft Planning Agreement
Attachments: image001.emz; image003.jpg


California Striped Bass Association
Dedicated to the Preservation, Enhancement, and Conservation
Of Striped Bass

October 2,

2006

Mr. Scott Cantrell
California Department of Fish and Game
Habitat Conservation Division
1416 Ninth Street, Room 1342-C
Sacramento CA 95816

Sent via E-Mail: [**scantrell@dfg.ca.gov**](mailto:scantrell@dfg.ca.gov)

Subject: Draft Planning Agreement Bay Delta Conservation Plan HCP/NCCP

I appreciate your taking my call regarding this issue and the follow up call by your staff. First as a sidebar, we understand that department's reg's. Allow 21 days for public comment. Under Federal Reg's. The public comment period would normally be 30 days. It would appear that the dissemination of your notice to interested reduced our opportunity to a six day period. None the less we are appreciative of the fact that we are allowed to comment.

We are a relatively young organization (36 years) with a current active membership of approximately 1,000 members that are dedicated primarily to the enhancement of anadromous striped bass that have called San Francisco Bay Delta and riverine systems home for in excess of 120 years. I would like to make it clear that we as a organization have a deep respect for all species within the entire echo system and have been saddened at what those that are sworn to protect our and future generations have been compromised by those that are driven by a inherited gene of the 19th and early 20th century Land and Water Barron's whose only motive appears to be power and profit at the expense of the states citizens.

To be faire, I did attend a few meetings held in BOR's offices in Sacramento. One group that obviously was missing was representatives of the fishing community that have historically inhabited the surrounding communities and their waterways in pursuit of its fisheries. Those that use its waters for local regional economics, recreation, and users of the local water that have seen their supplies shrink and contaminated by expansion of the X factor due to

10/3/2006

excessive exploitation. Yet the committee seemed to be heavily weighted by exchange contractors and agricultural interests south and west of the delta. It is no wonder that your plan is seeking to eliminate and or weaken protections that were originally agreed to through compromise by all parties prior to the construction and passage of the CVIP program in congress. Now we are being asked to compromise all of the protections that were so honorably won in the interest of moral responsibility to our heritage and the integrity that is incumbent as caretakers of a magnificent system that is in collapse.

I have seen and heard several times during those meetings that accomplishments were to be emphasized in building the matrix. Yet there was no mention of the failures that have been imposed by agreements related to mitigation and doubling of all game fish species, not just designated species as was addressed in the Four Pumps Agreement. Who specifically will benefit by the continued carte blanche given to and assumed by the exclusive clubs of water exporters, transfer agents, and state/federal policy makers that follow the cry heard during the public hearing on the Rod of 2000 that "they didn't give a damn about the fish". Some of these same individuals were and are part of the committee that formed the Plan.

Since passage of the 2000 Rod we have seen an accelerated deterioration of our Bay Delta echo systems. This is not limited to just too listed endangered species, but the Striped Bass, American Shad and their food chains. As you can see, I find difficulty in finding trust, given the past history and actions of a number of the agency's, and organizations represented on the committee. Especially since this committee was formed via a secret meeting of water interests in Reno. How different is this than the infamous Napa Agreement?

There are still a number of issues that I would like to discuss, but in the interest of time I must close. I apologize for not putting intended arguments in a logical order or prose. Thank you for your time.

Sincerely,

Gary R. Adams
President, California Striped Bass Association



SAN JOAQUIN FARM BUREAU FEDERATION

MEETING TODAY'S CHALLENGES / PLANNING FOR TOMORROW

October 2, 2006

Mr. Scott Cantrell
Habitat Conservation Division
California Department of Fish & Game
1416 Ninth St., Room 1342-C
Sacramento, CA 95814

RE: Comments on Draft Planning Agreement for the Bay-Delta Conservation Plan

Dear Mr. Cantrell,

The San Joaquin Farm Bureau Federation is a grassroots agricultural organization representing farmers and ranchers in San Joaquin County. Our members represent all facets of agriculture and are dedicated to keeping agriculture as the leading industry not only in San Joaquin County, but the State of California as well.

We appreciate the opportunity to comment on the draft planning agreement for the Bay-Delta Conservation Plan (BDCP). The San Joaquin Farm Bureau Federation will continue to monitor this proposed conservation plan as it progresses. San Joaquin County is an integral part of the Delta. Many of our members live and work in the Delta and many have been intimately involved with making sure that this important resource is viable for all Californians.

The planning agreement needs to maintain the flexibility that it has set forward so that additional stakeholders may participate in the development of the BDCP. There must be a mechanism in place to provide for this opportunity. There are many interests in the Delta and all of them should be allowed to give input. When all parties are involved in a process, compromise solutions are much more meaningful.

This planning process must remain in the legal Delta only. By expanding the scope, the focus becomes lost. Any conservation actions undertaken in the name of the BDCP outside of the legal Delta must be done so on a cooperative basis with non-BDCP parties.

We also believe that there should not be any redirected impacts onto landowners or local diverters in the Delta. This plan has been classified as an "in-stream" plan and addresses water operations, not land operations.

The Delta is home to many of our members and any decisions affecting this region also can affect their livelihoods and way of life. Their input is vital to your decision. We appreciate the opportunity to comment and we will continue to observe the process as it goes forward.

Sincerely,

Mike Robinson
President



CALIFORNIA FARM BUREAU FEDERATION

EXECUTIVE OFFICES

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3239 • PHONE (916) 561-5520 • FAX (916) 561-5690

Via U.S. Mail and Facsimile ((916) 651-7824)

October 2, 2006

Scott Cantrell
Habitat Conservation Division
California Department of Fish & Game
1416 Ninth Street, Room 1342-C
Sacramento, California 95814

Re: Comments on Draft Planning Agreement – Bay-Delta Conservation Plan

Dear Mr. Cantrell:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing over 88,000 farm families and individual members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to comment on the draft planning agreement for the Bay-Delta Conservation Plan ("BDCP"). Farm Bureau has been monitoring the planning process for the BDCP, and believes the BDCP has the potential to significantly affect the interests of its members. The draft planning agreement sets forth not only many governance issues which are critical to any outcome of the BDCP process, but also speaks to the ultimate substance of a BDCP. Accordingly, Farm Bureau believes this document must be clear in two respects.

First, the planning agreement should retain flexibility for additional stakeholders to participate substantively in development of the BDCP via a mechanism to add additional stakeholders to the steering committee. Farm Bureau believes current membership on the BDCP's steering committee may not ultimately reflect the spectrum of interests that may be impacted by the BDCP, and stakeholder participation as an "interested observer" may not adequately protect those interests. However, Farm Bureau

Letter to Scott Cantrell
October 2, 2006
Page 2

reads the draft planning agreement to provide for a potential expansion of steering committee membership, and therefore concurs with this framework.

Second, the planning agreement must clearly state that the planning area for the BDCP is intended to apply to the legal Delta only. Farm Bureau believes a more expansive plan is not workable, and the BDCP's likelihood of success in its intended objectives is depreciated in proportion to the scope of the BDCP. Farm Bureau also believes the planning agreement should state that any conservation actions undertaken pursuant to the BDCP which are outside the legal Delta will be implemented on a cooperative basis with non-BDCP parties. On both these points, Farm Bureau believes the draft planning agreement is explicit.

Because the BDCP implicates the interests of its members, Farm Bureau will continue to monitor the development of the BDCP. Farm Bureau is particularly concerned about third-party impacts in the implementation of the BDCP, and believes the process of developing the BDCP should be sensitive to those impacts. Farm Bureau has appreciated this opportunity to comment on the draft planning agreement, and if you have any questions with regard to these comments, please do not hesitate to call me directly at (916) 561-5520.

Sincerely,



PAUL WENGER
First Vice President

PW/CCS/pkh

Beth Gerbutavicius

-----Original Message-----

From: Scott Cantrell [mailto:SCANTREL@dfg.ca.gov]
Sent: Thursday, September 28, 2006 9:15 AM
To: Beth Gerbutavicius
Subject: Fwd: Fw: question RE BDCP and DRERIP

FYI. Here is another public comment on the Planning Agreement.

----- Original Message -----

From: Lori Clamurro
To: scantrell@dfg.ca.gov
Sent: Thursday, September 14, 2006 8:26 AM
Subject: question RE BDCP and DRERIP

Hello --

I just received the public notice for the Planning Agreement for the Bay-Delta Conservation Plan and was wondering ... is this the same as the DRERIP? If it's not, how will those two processes interface?

Thanks!

Lori Clamurro
Delta Protection Commission
loridpc@citlink.net
(916) 776-2290

Beth Gerbutavicius

From: Scott Cantrell [SCANTREL@dfg.ca.gov]
Sent: Thursday, September 28, 2006 9:01 AM
To: Beth Gerbutavicius
Subject: Fwd: From web page

FYI

>>> Gail Presley 9/27/2006 2:19 PM >>>

I received this email from the NCCP webpage. I deduced that she was referring to the BDCP PA. I don't know this person...

>>> "Blakeslee, Jeannie" <Jeannie.H.Blakeslee@conservation.ca.gov>

9/27/2006 2:08:21 PM >>>

Page 28 -- Under Westlands Water District. The last sentence is a fragment.
Call me at 323-4943 if you need clarification.

Thanks~

Jeannie Blakeslee
Staff Environmental Scientist
DLRP/DOC

Beth Gerbutavicius

From: Scott Cantrell [SCANTREL@dfg.ca.gov]
Sent: Thursday, September 28, 2006 9:01 AM
To: Beth Gerbutavicius
Subject: Fwd: Comment on September 8 draft Planning Agreement re the Bay Delta Conservation Plan

FYI

>>> "Tom Schlosser" <t.schlosser@msaj.com> 9/27/2006 5:38 PM >>>
Hello Mr. Cantrell,

I hope you will accept e-mail comments in response to the September 11 public notice

I am an attorney for the Hoopa Valley Indian Tribe. I write to express interest in access to information concerning the BDCP. If you are preparing a distribution list, please include me.

Section 7.4.2 of the draft plan mentions interested tribes as a target of outreach information. The Hoopa Valley Tribe is affected by public and private actions that affect covered species in the Delta because of the interconnection of the Trinity River and the CVP. See *Westlands v.*

Hoopa Valley Tribe. We would like to be advised as matter proceed on the BDCP. The approval of any federal HCP would be very significant to the tribe's concerns.

Thank you for your consideration. Please let me know if this comment must be submitted in paper form to be considered. If your e-mail program has difficulty with links in this message, I do apologize and will gladly resent a corrected message.

Thank you,

Tom Schlosser
MSJM
801 2d Ave, Ste. 1115
Seattle, WA 98104

206 386 5200
206 386 7322 fax

Beth Gerbutavicius

From: Scott Cantrell [SCANTREL@dfg.ca.gov]
Sent: Monday, October 02, 2006 4:16 PM
To: Beth Gerbutavicius
Cc: Tina Cannon; Cindy Darling; Laura Moon
Subject: Fwd: Comments / BDCP Planning Agreement

Here is another comment letter via e-mail.

>>> "Dave Widell" <dwidell@ducks.org> 10/2/2006 4:13 PM >>>
Scott, DU will be very interested in this process, as it progresses.
We
would therefore like to be listed as an Interested Observer.

Knowing that there may be strong interest by south of delta interests in establishing permit coverage for future projects and furtherance of the improvements package (including additional pumping capacity), we would strongly encourage the Resources Agency to consider south of delta habitat needs as well. Expanded transfer activity between ag/ag and ag/urban interests, compounded by increased water costs, has made it increasingly difficult for state, federal and private wetland interests to compete in the south of delta water market. We strongly believe that any new capacity made available as a result of this process must be provided equitably among all competing interests.

Thank you.

David L. Widell
Director of Conservation Policy
Ducks Unlimited, Western Regional Office 916-852-2000 (office)
916-761-5258 (mobile)